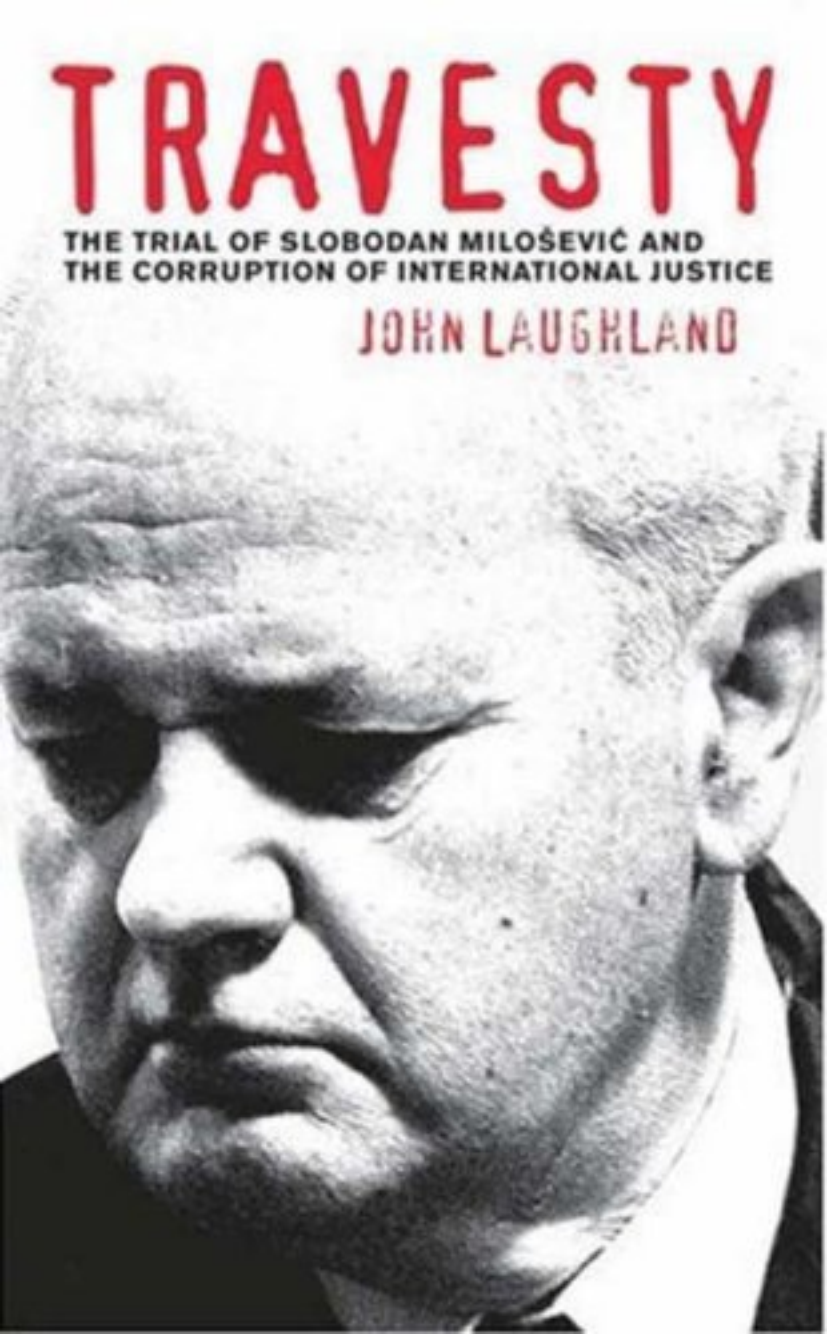
TRAVESTY

THE TRIAL OF SLOBODAN MILOŠEVIĆ AND THE CORRUPTION OF INTERNATIONAL JUSTICE

JOHN LAUGHLAND



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To my darling Emily

Roper: So now you'd give the devil the benefit of law?

Sir Thomas More: Yes. What would you do? Cut a great road through the law to get after the devil?

Roper: Yes, I'd cut down every tree in England to do that.

More: Oh, and when the last law was down and the devil turned 'round on you where would you hide, Roper, the laws all being flat? This country is planted thick with laws from coast to coast, man's laws not God's, and if you cut them down – and you're just the man to do it – do you really think that you could stand upright in the winds that would blow then? Yes, I'd give the devil the benefit of the law, for my own safety's sake.

Robert Bolt, *'A Man for all Seasons'*

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Foreword

Ramsey Clark
Former United States Attorney-General

Trials have always fascinated people. Criminal trials have both reflected and affected the values of the culture in which they occur. They have absorbed attention in every epoch of every society we know and often altered its destiny.

Think only of a few: Pontius Pilate versus Jesus, the King of the Jews; Joan of Arc; Louis XVI; the French Revolution's Committee of Public Justice; Alfred Dreyfus; Dostoyevsky's reports of common criminal trials in St Petersburg; the Moscow Show Trials; the Trials of Charles I; Sir Thomas More; the Star Chamber; Peter Zenger in colonial America; the impeachment of Warren Hastings, Governor General of colonial India; Oscar Wilde; the impeachment trial of President Andrew Johnson; Sacco and Vanzetti; the Scottsboro Boys; the Chicago Seven; O.J. Simpson; Nuremberg.

The trial of Slobodan Milošević demands special consideration in these times for three reasons of fundamental importance.

This was the first criminal trial of a head of state before a court, created by the Security Council of the United Nations or any other world organisation. The court was named the International Criminal Tribunal for the former Yugoslavia. Creation of the Court required great care, because illegal conduct by the UN itself can endanger all society and there is no ready means for restraining the United Nations from actions not authorised by its Charter.

A review of the United Nations Charter reveals that it grants no power to the Security Council, or elsewhere, to create a

criminal court. The Charter itself includes the Statute of the International Court of Justice. It was deliberately denied any criminal jurisdiction.

Examination of the history, background, drafting and approval of the UN Charter will convince everyone that there would never have been a United Nations if the five permanent members established in the Charter: the United Kingdom, the United States, France, the Union of Soviet Socialist Republics and China, thought there was any possibility it could create a criminal court.

The only way a criminal court can be created by the UN is after amendment to its Charter empowering it to do so. This is a cumbersome procedure never yet accomplished.

A study of international law reveals the only other way to create an international criminal court is by a multinational treaty. This is how the International Criminal Court, long overdue, finally came into being on 1 July 2002. Its tragically deficient statute has now been ratified by 120 nations, but not the United States, which undermined that statute before approval and has refused to ratify the treaty. The US has obstructed justice by coercing 80 nations, at the latest count, to enter into bilateral treaties that prohibit the surrender of any US citizen, or soldier for trial by the International Criminal Court.

If the Security Council can usurp power to create a criminal court, what limitation is there on its power to do whatever it chooses?

But the International Criminal Tribunal for the former Yugoslavia was not only conceived in sin, it violated the first purpose of the United Nations, and principal hope for the human species, 'to save succeeding generations from the scourge of war'. It also violated the first principle of the Charter, the 'sovereign equality' of all nations.

Yugoslavia was created after the First World War to bring peace to the Balkans through a federation of small constantly

warring 'southern Slav' states. After its devastation in the Second World War, the concept of a federation of six predominately Slavic states became a working reality. Situated between western Europe and the Soviet Union, Yugoslavia maintained its sovereign independence from both sides of the deadly cold war. It helped create the Non-Aligned Movement to resist the pressures and threats of violence from both Eastern and Western blocs.

After the collapse of the Soviet Union and its bloc, the US, Germany and other powerful states acted to break up Yugoslavia, to balkanise the Balkans, to ignore its sovereign equality, to dominate and exploit the small pieces and demonise its former federal leadership by selective, discriminatory, illegal and often false charges of international crimes.

Unbelievably, the US, which heavily bombed Belgrade in 1945, again sent aircraft, which bombed Yugoslavia from Novi Sad to Niš to Belgrade in 1999. The US was joined by Germany and NATO, if only in minor roles, to bomb all of Kosovo until Yugoslavia was no more.

The ICTY was empowered only to indict the victims of US and NATO assaults, not the aggressors. The Court was 'war by other means', the corruption of international law and justice to pursue enemies.

I watched Slobodan Milošević on TV during the lengthy peace negotiations he personally led for his country, but first met him in the early days of the heavy US bombardment of Belgrade. His home had been targeted and destroyed. I was invited to see the ruins, then to meet with him in a nearby government building. The next time I saw him was in his cell at The Hague. We met for three consecutive days about four weeks after he arrived there. It was his first unmonitored meeting. Thereafter I met him four or five times in prison, the last was several months before his death. In that meeting his physical deterioration and low energy was obvious. His conduct remained constant on all the occasions; cordial, a little

humour, focused on whoever he was talking to and attentive to their words, optimistic, uncomplaining, concentrated and clear and direct in what he said.

His purpose was clear. He sought peace. He wanted to preserve and protect Yugoslavia, the federation of six republics. When he saw this was not possible, he sought to preserve and protect Serbia. He was highly informed, keenly aware of the power confronting his country and pressing his case and he was committed to persevere to the end.

The trial itself is both a monument to the courage, tenacity and competence of a man determined to be master of his fate and to the political abuse of judicial power to the point of death.

Against the vast resources of a determined United States, which coerced the Security Council to create the ICTY through its UN Ambassador Madeleine Albright, Slobodan Milošević stood alone before a hostile court created to convict him. Before the Prosecution finished presenting its evidence, two years passed; more than 300 trial days, nearly 300 witnesses, 30,000 pages of trial transcript.

He toiled night and day in the close, damp confines of a prison in The Hague built and originally used by the Nazis. Every effort to provide him with research, analysis, documents and a helping hand as he prepared his lonely stand against a belligerent court and prosecution was largely frustrated. Every effort to protect his patently exhausting physical health with life-saving medical support was rejected.

Two days before the death of Slobodan Milošević, still struggling for truth and his country, my final message was submitted to the ITCY. Six pages, prepared for a defence committee, recited his physical condition and demanded immediate medical attention, and was received by the judges. It stated: 'The death or serious impairment of President Milošević for want of medical care will impose the same

sentence on the ICTY and international law as a means to peace.'

The letter was too late for the Court to react. We never received an answer. This 'unconquerable soul' was gone, but its message is immortal.

Study this story. Our future depends on a vigilant and informed people.

The truth is hard to find, but in John Laughland we are fortunate to have a man blessed with the three qualities for which, Anatole France wrote, in *The Revolt of the Angels*, Lucifer was banished from Heaven: 'liberty, curiosity and doubt'. That is, the freedom to seek all facts, the desire to find the truth and the scepticism, since even facts can be the enemy of truth, to scrutinise what you find with care.

In our time of consummate obfuscation and manipulation, the skills and scepticism of a John Laughland are the best resource we have to find the truth that can set us free.

Ramsey Clark
New York, NY
October 2006

Introduction

WHEN THE INDICTMENT against Slobodan Milošević, President of the Federal Republic of Yugoslavia, was announced by the International Criminal Tribunal for the former Yugoslavia (ICTY) in The Hague on Thursday, 27 May 1999, it created an instant sensation around the world. The indictment was published two months after NATO, the world's most powerful military alliance, had started raining down bombs on the small state of Yugoslavia on 24 March 1999. The bombing campaign was to last until early June. The world's television screens had been filled with highly emotive pictures of refugees fleeing into Macedonia and Albania, and the Western media had been saturated with NATO's war propaganda about atrocities being committed against the civilian ethnic Albanian population in the southern Serbian province of Kosovo. The first indictment in history by an international tribunal of a sitting head of state for war crimes and crimes against humanity greatly bolstered NATO's cause.

Milošević was in fact only one of five Yugoslav leaders to be indicted. Since he was the president, and since he seemed to be the central figure in the Balkan wars, which had started to rage in 1991, his indictment and subsequent trial attracted the most attention. However, the fact that the indictment named many of the leading political and military officials in Yugoslavia emphasised its unique constitutional importance. Just as the declared purpose of NATO's bombing campaign was to overturn the existing international system – to abolish national sovereignty as the cornerstone of international law,

and henceforth to allow military attacks on states that were said to be abusing universal human rights – so the criminal condemnation of the entire war policy of the Yugoslav state by the ICTY Prosecutor, and the approval of that indictment by the ICTY judges, were clear signals that international law would no longer be based on the principle of state sovereignty. NATO's war and the indictment of Slobodan Milošević were therefore ideologically linked at the deepest possible level. In fact, they were two sides of the same coin – a state of affairs conveniently emphasised by the fact that, during the bombing, the ICTY website helpfully carried a link to NATO on its home page.

The unprecedented indictment was eventually to lead to a trial, which was itself unique by almost every measure. The Milošević trial was the longest criminal trial in history, having lasted for four years from February 2002 until Milošević's death in his cell on the morning of Saturday, 11 March 2006. Its duration contrasts with the Nuremberg trial of twenty leading Nazis, which lasted just ten months from 20 November 1945 to 30 September 1946. By the end of the trial, the transcripts ran to just under 50,000 pages and nearly 300 witnesses had testified. The Filings, exhibits, documentation, DVDs and videos presented at the trial ran to a total of more than 1.2 million pages.[1] If a person sat down and tried to read all this material, reading at a rate of one page a minute, eight hours a day, 365 days a year, it would take him over seven years to accomplish his task. In other words, it is an impossible task: the total amount of material submitted in the Milošević trial has never been read by any single individual and the trial was therefore Kafkaesque in the true sense of the term. The cost of the trial was concomitantly enormous. The budget of the International Criminal Tribunal for the former Yugoslavia (ICTY) runs at nearly US $300 million a year. There are no

1. Figures given by assigned counsel, Steven Kay, Trial Chamber, 29 November 2005, Milošević trial transcript, p. 46701.

official figures for the cost of specific trials but one estimate is that 20 per cent of the ICTY's costs went on the Milošević trial, or some $20–30 million a year for six years.

The trial was attended by some of the world's most powerful people and many of the major players in the Yugoslav wars. The presidents of Croatia and Slovenia, the former president of the Federal Republic of Yugoslavia (Milošević's predecessor), former prime ministers of Yugoslavia and of the Soviet Union, the chief of staff of the Russian Army, the former supreme commander of NATO, the high representative of Bosnia & Herzegovina, and the EU's special envoy during the Balkan wars all came to testify: most of their appearances in The Hague were ignored by the world's media. Tony Blair, the British prime minister, and Gerhard Schröder, the former German chancellor, were also called to attend for cross-examination by Milošević, but they refused to do so and the ICTY judges refused to issue subpoenas to force them to testify. The Presiding judge, Sir Richard May (who had stood as Labour Party candidate against Margaret Thatcher in the constituency of Finchley at the General Election of 1979, which brought Thatcher's Conservative government to power) died two years into the proceedings; instead of being allowed to collapse, the trial continued.

Milošević himself died in custody, the seventh defendant at the ICTY to have died either in The Hague or shortly after release. He had been in poor health throughout and yet, instead of releasing him on compassionate grounds as the British authorities had done with General Pinochet (after having detained him for months on the basis of an arrest warrant issued by a Spanish magistrate), the ICTY judges used his illness as an excuse for taking the unprecedented decision to impose a defence lawyer on their most famous defendant. This means that, in international law, a sick man can now be convicted on the basis of a trial at which he has been 'represented' by a lawyer whom he has in fact not appointed and whom he does

not instruct. He can even be tried *in absentia*, as Milošević himself was. As the ICTY itself admitted, there is no precedent anywhere in national or international law for such measures. Staff at the ICTY added insult to injury when they alleged, after his death, that Milošević had deliberately damaged his own health by taking medicine that had not been prescribed.

In spite of the fact that the trial cast light on some of the most interesting and widely discussed events of the end of the twentieth century, the proceedings were effectively ignored by the world's media. Indeed, many members of the public had forgotten that Milošević was even still on trial when he died in March 2006. The only partial exceptions to this media silence came when the Prosecution announced that some 'star witness' was due to appear, or that some 'smoking gun' piece of evidence was due to emerge. In fact, neither of these ever did. On the contrary, many of the Prosecution witnesses backfired. Whereas supporters of international criminal justice had written excitedly at the beginning of the trial that it was to be 'the world's most closely watched criminal proceeding since the trial of O.J. Simpson',[2] in fact the media quickly lost interest after the initial thrill of more atrocity propaganda had worn off, and when the trial revealed that the facts involved were far more nuanced. During the trial, most of the world's mainstream media behaved as indulgently towards the Hague Tribunal as had human rights activists from the *Ligue des droits de l'homme* who observed the Moscow show trials in the 1930s and reported back that they were models of due process.

Today's *journalistes engagés*, so quick to issue moral condemnations when they are of people whom everyone loves to hate, seem never to question the procedures and philosophy of the ICTY or of 'international justice' in general. In fact, the

2. Michael P. Scharf and William A. Schabas, *Slobodan Milošević on trial: A Companion*, Continuum, New York and London, 2002, p. 3.

Tribunal's rules and procedures are heavily stacked against the Defence and in favour of the Prosecution. The Tribunal is not subject to any meaningful control and, as the author of its own rules of evidence, it often bends the law and established procedure to obtain convictions. The underlying assumption often seems to be that 'justice' means a guilty verdict at all costs. In the brave new world of so-called international law, indeed, it has become a banality for Western leaders to demonise the leaders of enemy states, often in order to obscure the atrocities committed by the West itself on their territory. This has led many people in the West to think that they know that Milošević was guilty as charged, or that he was an evil man, even when they are ignorant about the most basic facts concerning the former Yugoslavia, its wars and the NATO attacks of 1999.

This book will argue that the trial was inherently political, and that the political nature of the indictment made a fair trial impossible. The very fact that the trial lasted for four years is itself indication of an unfair trial: compare it to the guidelines laid down by the Lord Chief Justice for England and Wales in March 2005, which say that even the most complex criminal trials should last between three and six months.[3] There is unfortunately nothing new about the judicial process being abused to further political goals. All revolutionary forces in modern history have sought to legitimise their regimes with a symbolic murder in the form of a trial and execution of the leader of the old regime. The mere appearance in court of a former king is enough to show that a new regime is in power. Such trials are anvils upon which a new political order is supposed to be forged – and they are seldom models of due process. This is why the Milošević trial's pedigree lies in the great revolutionary trials of the past, organised as it was to emphasise the dawn of a New World Order in international

3. 'Control and Management of Heavy Fraud and Other Complex Criminal Cases, A Protocol issued by the Lord Chief Justice of England and Wales', 22 March 2005.

law. NATO and the Western states needed the Milošević trial to prove that they had torn up the existing rules of the international system and replaced it with a new globalist regime, in which the rights and duties of states had given way to a universal regime of 'human rights'.

History shows that such show trials in fact corrupt the criminal justice system. The destruction of lawfulness, especially if carried out in the name of morality, is a matter of the greatest concern to all of those who are interested in that precious jewel of Western civilisation, the rule of law. For, as Charles Stuart said as he was led to the gallows, 'If power without law may make laws, I do not know what subject he is in England that can be sure of his life or any thing that he calls his own.' The subsequent dictatorship of Oliver Cromwell proved him right. In our own day, the 'war on terror' has shown how an aggressive stance in foreign policy leads quickly to an attack on civil liberties at home. If a culture of condemnation is allowed to pass for 'justice', then it will not be long before innocent people are judicially lynched in domestic courts as well. This is why a lawyer representing a defendant at the Hague Tribunal, who struggled against its destruction of established legal principles, wrote in 1999, 'We are fighting here the battles which were fought to establish the principles enunciated in Magna Carta and the American Constitution. Yet the stakes are much higher this time. For if we fail we will lose the whole world, since there will be nowhere else to hide.'[4]

4. Private correspondence with the author.

1
'A little bombing to see reason'

NATO CLAIMED IN March 1999 that it was attacking Yugoslavia to prevent persecution of the ethnic Albanian civilian population of Kosovo, a province of Serbia. It had started the bombing without any approval from the United Nations Security Council, and instead invoked the claims of universal human rights, saying that these trumped national sovereignty and the existing rules of international law.

These arguments were but claims for vigilantism on a world scale. The principles of non-interference and legality are at the heart of the international system as expressed in the charter of the United Nations, just as they are backed up by centuries of customary international law. To be sure, this was not the first time international law had been broken, but it was the first time that it had been flouted with such open contempt. World leaders who said that the current arrangements of the international system should not constrain their actions, and that legal formality should not stand in their way, were in fact advocating a lawless world. Even if the moral case for the war had existed, which it did not, there would still have to have been a formal authorisation for the law to be legal. The Kosovo war therefore prepared the ground for the attack on Iraq in 2003, which also occurred with UN Security Council approval but also in the name of spurious justifications in international law (in Iraq's case, the existence of 'weapons of mass destruction').

Western leaders made their legal and constitutional position very clear. The Czech president, Václav Havel, argued that sovereignty should no longer be the basis of the international system. 'This war places human rights above the rights of the state,' he wrote.[1] Havel claimed that the Kosovo war would serve as a precedent for the whole world, and that the old doctrine of non-intervention would disappear down 'the trap door of history'. The British prime minister, Tony Blair, argued in a speech entitled 'The doctrine of the international community' and delivered in Chicago on 22 April 1999 that the Kosovo war and economic globalisation showed that the international system had to change:

> We are all internationalists now, whether we like it or not. We cannot refuse to participate in global markets if we want to prosper. We cannot ignore new political ideas in other countries if we want to innovate. We cannot turn our backs on conflicts and the violation of human rights within other countries if we want still to be secure. On the eve of a new Millennium we are now in a new world. We need new rules for international co-operation and new ways of organising our international institutions.

NATO took a similar view. The organisation was celebrating its fiftieth anniversary, having been in search of a new justification for its existence since the end of the Cold War, and on 24 April 1999, it proclaimed a 'new strategic concept'. Whereas it had been created as a defensive alliance to protect the sovereignty of its member states against a putative Soviet attack, it now adopted a proactive military policy, which meant that it might attack other states if necessary. One possible *casus belli* was the abuse of human rights in other countries. Other 'threats' to which the alliance might be obligated to respond included 'ethnic and religious rivalries, territorial disputes, inadequate or failed efforts at reform … the dissolution of states … acts

1. Václav Havel, 'Kosovo and the End of the Nation-State', *New York Review of Books*, 10 June 1999.

of terrorism … the disruption of the flow of vital resources'. [2] The 'war on terror' was not born on 11 September 2001 but well before then.

NATO alleged that Yugoslav forces were making massive attacks against ethnic Albanian civilians in Kosovo in pursuit of a programme of racial persecution known as 'ethnic cleansing'. This claim lay at the very heart of the NATO case for war and of the indictment of Milošević and the other Yugoslav leaders. 'It is no exaggeration,' wrote the British Prime Minister, Tony Blair, 'to say what is happening in Kosovo is racial genocide. Milošević is determined to wipe a people from the face of his country.'[3] Blair went into overdrive: 'Children seeing their fathers dragged away to be shot. Thousands executed. Tens of thousands beaten. 100,000 men missing. 1.5 million people driven from their homes.'[4]

The world's media joined in the frenzy. Lurid atrocity 'reporting' spread like a collective madness. Saturation coverage was provided of weeping Albanian refugees and the wildest stories about mass killings abounded. At one point, for instance, it was claimed that the Serbs, like the Nazis at Auschwitz, were burning the bodies of 1,500 murdered Albanians in the incinerators at the Trepča Mining Complex.[5] Some of those who set themselves up as leading authorities on the Balkans fell for this blatant piece of war propaganda,[6] even though it turned out to be completely false.[7]

2. 'The Alliance's Strategic Concept', approved by the Heads of State and Government participating in the meeting of the North Atlantic Council in Washington DC on 23 and 24 April 1999 <www.nato.int>.
3. 'My pledge to the refugees', by Tony Blair, *BBC News Online*, 14 May 1999.
4. Tony Blair, 'The new challenge for Europe', speech, 20 May 1999.
5. 'Serbs "burning bodies" in rush to hide war crimes evidence', John Sweeney and Patrick Wintour, *Observer*, 6 June 1999.
6. Noel Malcolm, 'Yes, there were mass killings', *The Spectator*, 4 December 1999, p. 25.
7. 'No bodies at rumoured grave site in Kosovo', *Reuters*, 13 October 1999. Kelly Moore, a spokesperson for the ICTY, said after ICTY investigators had examined Trepča, 'They found absolutely nothing.'

These stories were driven by the war propaganda emanating from the governments of the most powerful Western countries, primarily the United States.[8] The US State Department produced a report in May 1999, during the bombing, entitled 'Erasing History', which alleged that 'The regime of Slobodan Milošević is conducting a campaign of forced migration on a scale not seen in Europe since the Second World War.' The report contained numerous falsehoods, from the overall allegation of genocide (which was so unsustainable that it was never included in the Kosovo indictment, not even when this was revised in June 2001, two years after the end of hostilities), to specific claims such as one that the Kosovar capital, Priština, had become 'a ghost town' when in fact, there were still hundreds of thousands of people living there.[9]

Leading statesman fed the media with huge casualty figures, secure in the knowledge that their claims would be reported as fact before anything could be checked. In April, the US Ambassador for War Crimes, David Scheffer, said he thought 100,000 Albanians had been killed,[10] a figure repeated by US Defense Secretary William Cohen the following month.[11] Cohen's claims were widely reported the following day as

8. *Degraded Capability, The Media and the Kosovo Crisis*, eds Philip Hammond and Edward S. Herman, with a foreword by Harold Pinter, Pluto Press, London, 2000, especially Part III and David Chandler's excellent chapter on the West's role in the disintegration of Yugoslavia 1989–99. See also *The First Casualty: The War Correspondent as Hero and Myth-Maker from the Crimea to Kosovo* by Phillip Knightley, Introduction by John Pilger, Prion Books, London, 2nd edition, 2000 (first edition 1975).
9. BBC World Service News report, 18 May 1999. See also 'In One Village, Albanian Men are Everywhere', Paul Watson, *Los Angeles Times*, 17 May 1999, who quotes Fatmir Seholi saying, 'As an Albanian, I am convinced that the Serbian government and security forces are not committing any kind of genocide.'
10. Fox News, 18 April 1999. See also 'U.S. fears 100,000 Kosovar men slain', *Detroit News* wire service, 19 April 1999.
11. CBS News, 'Face the Nation', 16 May 1999.

fact.[12] The British government was a little more circumspect, preferring the figure of '10,000 killed', a figure it initially mooted in June 1999 but which it stuck to until well into the following year.[13]

These claims of genocide had a general and a particular function. Their general function was to work as war propaganda. Their particular function was a legal one. Genocide is a specific crime in international humanitarian law, coming under 'universal jurisdiction', and the existing treaties on it require all states to prosecute those accused of it. NATO leaders pretended that this meant there exists a right of 'humanitarian intervention' where genocide is occurring, while in fact there does not.

The centrepiece of NATO's claim in this regard was 'Operation Horseshoe'. This was allegedly a Serbian plan to drive out the Albanian population from Kosovo in order to establish ethnic Serb hegemony in that province. The NATO spokesman, Jamie Shea, referred frequently to Operation Horseshoe in his press conferences while the bombing was in progress,[14] and the media reported it as fact.[15] Eventually, it turned out to be an invention of the secret services of Western states.[16] The game was given away when the document allegedly outlining it had 'horseshoe' written in the Croatian not Serbian

12. See for instance 'Cohen: Bis zu 100 000 männliche Kosovo-Albaner getötet' as sub-headline of news report, 'UNHCR: Serben zwingen Flüchtlingszug zur Rückfahrt', *Handelsblatt*, 17 May 1999.
13. Statement by Geoff Hoon, Minister of State at the Foreign Office, BBC News, 17 June 1999. See also Keith Vaz, Minister of State at the Foreign Office, Answer to a parliamentary question, 21 February 2000, Hansard, 21 February 2000, 838W.
14. E.g. Press Conference with General Jertz, 17 May 1999 <www.nato.int/kosovo>.
15. E.g. 'Kosovo, the untold story' (Part 2), Peter Beaumont and Patrick Wintour, *Observer*, 18 July 1999.
16. Heinz Loquai, *Der Kosovo-Konflikt, Wege in einen vermeidbaren Krieg, Die Zeit von Ende November 1997 bis März 1999*, Nomos Verlag, Baden-Baden, 2000, Chapter 8.

form of the word (*potkova* instead of *potkovica*). Of course there were ugly incidents and war crimes in Kosovo, just as Albanian guerrillas indubitably committed atrocities against Serb civilians and other Albanians. But Operation Horseshoe had as much relationship to reality as did the fictional character, 'Gruban', hero of Miodrag Bulatović's novel *Hero on a Donkey*, whose name was included in an indictment issued by the ICTY Prosecutor on 13 February 1995, the result of a practical joke played by a Serbian journalist on an American colleague. Having a drink one night in a bar, the Serb told the American that a brutal guard at the Omarska camp in Bosnia was called 'Gruban', and the journalist, who evidently had a second job as an informer but who did not understand the literary reference, passed the name on to The Hague. The indictment against 'Gruban' and others was eventually withdrawn three years later, on 8 May 1998, presumably when the ICTY Prosecutors realised they did not have much chance of ever seeing him in court.[17]

The non-existence of Operation Horseshoe[18] did not prevent Louise Arbour, the Chief Prosecutor at the ICTY, from putting the claim of ethnic cleansing at the centre of the Kosovo indictment. In fact, she dropped heavy hints that the indictment would soon be upgraded to include genocide. Speaking on 18 June 1999 (appropriately enough, at NATO headquarters), Arbour said:

> We have never excluded the possibility of framing the charges under the genocide convention … I don't think it's a secret that what is being uncovered on the ground is of very troubling order of magnitude and we will certainly want to reassess particularly when it comes to homicides, murders. We will examine whether it would

17. ICTY Press Release, 8 May 1998 <www.un.org/icty>. N.B. 'Gruban' is not to be confused with Momčilo Gruban, who does exist and who is also a Hague indictee.
18. The UK Parliament Foreign Affairs Select Committee report on Kosovo, 23 May 2000, was not prepared to say that Operation Horseshoe had ever really existed.

> be appropriate to … upgrade some of the existing charges and bring more serious charges against these and other accused.[19]

These further charges never materialised. Although media reports in the immediate aftermath of the war were full of ghoulish stories about hundreds of 'mass grave' sites all across Kosovo, none were found. Even though the Kosovo indictment was subsequently revised twice, on 29 June 2001 and 29 October 2001, the list of people that the ICTY alleged Yugoslav forces had killed numbered 585. Even this list included the names of known KLA fighters. Of course crimes against humanity are not a matter of statistics alone, but this figure is a tiny fraction of the numbers being bandied about by Western leaders during the bombing.

The news of the 'disappointing' body count started to emerge in September 1999, when a team of Spanish forensic doctors, who had been told to expect to have to carry out thousands of autopsies, packed their bags and returned home after being given only 187 cadavers to examine.[20] At numerous sites where the US State Department claimed there had been hundreds of killings, the ICTY investigators found no bodies whatsoever. In the places where bodies were discovered, the numbers of bodies exhumed was about one-tenth of those claimed by the US government during the bombing.

Articles appeared on the matter in the autumn of 1999,[21] and by the following year it was widely accepted that NATO had exaggerated the scale of the atrocities, even by media

19. Canadian Joint Press Conference, with Honourable Lloyd Axworthy, Minister of Foreign Affairs of Canada, Honourable Art Eggleton, Minister of National Defense of Canada, Justice Louise Arbour, Chief Prosecutor ICTY, NATO HQ 18 June 1999 <www.nato.int>.
20. 'Policías y forenses españoles no hallan pruebas de genocidio al norte de Kosovo', by Pablo Ordaz, *El País*, 23 September 1999.
21. This author was the first to reveal the exaggerations. See John Laughland, 'The massacres that never were', *The Spectator*, 30 October 1999 and 'I was right about Kosovo', *The Spectator*, 20 November 1999.

who had reported the original allegations as fact.[22] One of the most poignant examples of the lies told by Albanians and their allies to justify the war were those recounted to Canadian Broadcasting Corporation (CBC) correspondent Nancy Durham by Rajmonda Rreci, a Kosovo Albanian girl who told the reporter she had taken up arms to avenge her sister's murder by Serbs. Durham had broadcast emotional reports about Rajmonda in 1998, as the Kosovo conflict was beginning, but when she visited Rajmonda in Kosovo again in September 1999 she found that the girl's sister was alive and well. She had lied.[23] (The fact that the BBC had been able to glorify a girl fighter did not stop it expressing outrage whenever there were reports of Yugoslav forces killing women.) In 2004, moreover, a Pulitzer Prize finalist journalist for *USA Today* resigned after it was revealed that he had faked proof about a meeting in 1999 at which he claimed he had been shown direct evidence of an order to ethnically cleanse a Kosovo village, about which he had published an article on the front page of his newspaper at the height of the war.[24]

Moreover, NATO had itself committed terrible massacres, such as when it bombed a convoy of 87 Albanians who were returning to their homes near Korisa in May 1999, or when it massacred scores of civilians doing their shopping in the marketplace at Niš. NATO had dropped cluster bombs on Niš, which issue a shower of bomblets and cause maximum

22. 'Serb killings "exaggerated" by West,' by Jonathan Steele, *Guardian*, 18 August 2000; 'Body Count: War in Kosovo Was Cruel, Bitter, Savage; Genocide It Wasn't, Tales of Mass Atrocity Arose And Were Passed Along, Often With Little Proof, No Corpses in Mine Shaft', by Daniel Pearl and Robert Block, *Wall Street Journal*, 31 December 1999; 'Numbers were best available, officials say', by Steven Komarow, *USA Today*, 1 July 1999.
23. Nancy Durham, 'The Truth about Rajmonda', <www.tv.cbc.ca>, 8 September 1999.
24. 'Fear and Lying at USA Today. Writer Says Panic Led to Deception, Then Resignation', by Howard Kurtz, *Washington Post*, 11 January 2004, p. A01.

damage over a wide area. In Kosovo,[25] NATO used depleted uranium, which continued to cause cancer seven years later.[26] There were dozens of such attacks, and NATO spokesman regularly denied reports of civilian deaths ('collateral damage') before admitting the truth.[27] In the event, NATO killed roughly the same number of civilians as the Yugoslav forces allegedly did, while NATO's murderous allies, the Albanian insurgents, carried out a spree of ethnic cleansing of Serbs, Bosniaks and gypsies, tens of thousands of whom fled north in the days between the withdrawal of Yugoslav troops from Kosovo and the arrival of NATO's. NATO also tried to kill President Milošević personally in an air strike on his house on 22 April 1999.

As information began to seep out that the claims about Serb atrocities were exaggerated, Louise Arbour left her job as Chief Prosecutor to join the Supreme Court of Canada on 15 September 1999. Had she started to realise the 'Kosovo genocide' was as non-existent as the weapons of mass destruction were to be in Iraq in 2003? Her successor, Carla del Ponte, reported to the United Nations on 10 November 1999 that a total of 2,108 bodies had been exhumed by forensic specialists, of various nationalities, and who had died from various causes.[28] Given that there had been Serb and Albanian victims in the conflict, and that NATO itself had killed additional hundreds of people, mainly civilians, the humanitarian justification for the war was clearly non-existent. The International Committee

25. Written reply by John Spellar MP, Minister of State for the Armed Forces, to a Parliamentary Question put down by Alice Mahon MP, 28 March 2000.
26. 'Official Italian report shows rise in tumours among Balkan troops', BBC Monitoring Europe (Political), 6 April 2006, referring to a report published in *Corriere della sera* on 5 April 2006.
27. Eve-Ann Prentice, *One Woman's War*, Duck Editions, London, 2000, e.g. pp. 144–5.
28. 'Prosecutor for Former Yugoslavia, Rwanda Tribunals Briefs Security Council, Emphasizes Need for Cooperation from States', UN Press Release SC/6749, 10 November 1999.

for the Red Cross at this stage was listing just over 3,000 people missing, that is, including all nationalities and including both missing and missing presumed dead. There had been huge emigration from Kosovo and Yugoslavia at this time, especially of Albanians, as reports from the refugee camp at Sangatte near Calais attested at the time, and many of the people on the 'missing' list may simply have left to start a new life abroad.[29]

Meanwhile, there was good evidence to say that the mass exodus of Albanians from Kosovo, which had created such a media sensation, was not the result of any ethnic cleansing plan but instead a natural reaction to the NATO bombing and a brilliant propaganda exercise. Following the dramatic success of the mass 'walk-out' of East Germans from East Germany in 1989, and the huge media shock created by the arrival of the first Kosovo Albanian refugees several days after the NATO bombing started, the KLA doubtless realised the crucial importance of maintaining the flow of refugees to bolster Western public support for their cause. Many people in the West, indeed, quickly forgot that there had been no refugees before the bombing had started. The view that the label 'refugees' was a misnomer is bolstered by the fact that the hundreds of thousands of people who made their way to Macedonia and Albania did not have any of the injuries or medical complaints one would expect from people who had fled rampaging genocidal killers.[30]

Worse still than the non-existence of genocide in Kosovo was the fact that the NATO bombing had in fact started for an entirely different reason. The countdown to war began with the events in Račak on 15 January 1999. Kosovo Albanian sources and Western governments alleged that a massacre had

29. 'Refugees 1999', report by British Helsinki Human Rights Group, <www.oscewatch.org>.
30. 'Truth Chokes on the Fog of War', by Tony Allen-Mills, *Sunday Times*, 28 March 1999.

occurred in that southern Kosovo village; the Serbs countered that there had been a fire-fight during which KLA terrorists had been killed. The Organization for Security and Co-operation in Europe (OSCE) took an active role in the investigation, with an especially important role being played by the head of its mission in Kosovo, the US ex-ambassador, William Walker.

Walker had been US ambassador to El Salvador at a time when atrocities had been committed by US-backed insurgents there. He had also played a role in the campaign to overthrow General Noriega of Panama in 1988–89.[31] The Kosovo Verification Mission, which he headed, was largely staffed with intelligence officers from Western states, especially Britain and the US, and it pursued a political agenda of making matters in Kosovo worse in order to destabilise Milošević.[32] As Roland Keith, a former member of the KVM remarked, Walker was essentially working for the US government: 'It appeared to me … that powers higher than mine had no real interest in rebuilding stability in Kosovo but probably had other political agendas of which this [that is, peace] would not play a role whatsoever.'[33] The extent of cooperation at that stage between the theoretically independent KVM and NATO was underlined when Walker personally called both Richard Holbrooke, the US envoy for the Balkans, and Wesley Clark, the US general who was Supreme Commander of NATO, from Račak on his cell phone, even though he subsequently denied having done this.[34]

31. *America's Prisoner, The Memoirs of Manuel Noriega*, Manuel Noriega and Peter Eisner, Random House, New York, 1997, p. 126.
32. *Shadowplay* by Tim Marshall, Samizadat B92, Belgrade, 2003, pp. 38, 48 and 51. See also 'CIA aided Kosovo guerrilla army', by Tom Walker and Aidan Laverty, *Sunday Times*, 12 March 2000.
33. Trial transcript, 14 September 2004, p. 32760.
34. As confirmed by Holbrooke and Clark, despite Walker's denials, in 'Moral Combat', BBC2, 12 March 2000. Transcript available on BBC website. See also Wesley Clark, 'Waging Modern War', *Public Affairs*, Oxford, 2000, p. 160.

Račak was the pretext for the convocation by the Western powers of a meeting between KLA representatives and the Yugoslav government, held at Rambouillet outside Paris at the end of February 1999. This meeting is often referred to as a 'negotiation' but in fact the two sides never actually met. Inasmuch as they communicated, it was through US mediators. The break point came when the Western 'mediators' presented the Yugoslavs with a document to sign, the terms of which no state could ever have accepted. Not only did the document demand of Yugoslavia that it radically reorganise its own territorial arrangements and grant Kosovo a very large measure of autonomy, it also demanded that NATO have the right to occupy the whole of Yugoslavia, ostensibly in order to monitor and police the agreement. Rambouillet demanded that:

> NATO personnel shall be immune from any form of arrest, investigation, or detention by the authorities in the FRY [Federal Republic of Yugoslavia]. NATO personnel erroneously arrested or detained shall immediately be turned over to NATO authorities.
>
> NATO personnel shall enjoy, together with their vehicles, vessels, aircraft, and equipment, free and unrestricted passage and unimpeded access throughout the FRY including associated airspace and territorial waters. This shall include, but not be limited to, the right of bivouac, maneuver, billet, and utilization of any areas or facilities as required for support, training, and operations.
>
> NATO shall be exempt from duties, taxes, and other charges and inspections and custom regulations including providing inventories or other routine customs documentation, for personnel, vehicles, vessels, aircraft, equipment, supplies,

and provisions entering, exiting, or transiting the territory of the FRY in support of the Operation.[35]

The terms were simply excessive. No state could agree to the occupation of the whole of its territory, under draconian conditions, by a hostile army. Serbs with long historical memories compared the Rambouillet ultimatum to the ultimatum that Austria issued to Serbia following the assassination of the Archduke Franz Ferdinand in Sarajevo in July 1914. Then Austria had, rather like NATO, demanded free access to the whole of Serbia's territory for its police and security forces. Serbia's refusal of that ultimatum triggered the First World War.

There are good reasons for thinking that the demands made in the Rambouillet document were made deliberately in order to provide a pretext for war. Britain's second most senior defence minister, Lord Gilbert, Minister of State for Defence, said later, 'I think certain people were spoiling for a fight in NATO at that time. I think the terms put to Milošević at Rambouillet were absolutely intolerable: how could he possibly accept them? It was quite deliberate.'[36] The former US State Department official George Kenney has written that an unimpeachable source told him that the US 'deliberately set the bar higher than the Serbs could accept'. Kenney comments, 'The Serbs needed, according to the official, a little bombing to see reason.'[37]

The Yugoslav parliament rejected the Rambouillet ultimatum on 23 March 1999 and bombing started the following evening. Three days later, refugees started to arrive on the Albanian

35. 'Interim Agreement for Peace and Self-Government in Kosovo', Rambouillet, 23 February 1999, 'Appendix B: Status of Multi-National Military Implementation Force.'
36. 'War strategy ridiculed, Special report: Kosovo', by Patrick Wintour, *Guardian*, 21 July 2000.
37. 'Rolling Thunder: the Rerun', George Kenney, *The Nation*, 14 June 1999.

and Macedonian borders. The effect of their arrival was sensational: it allowed the NATO powers to claim retrospectively that its bombing campaign was designed to prevent a genocide, which in fact had not even been alleged until after the bombing started.

In other words, NATO had taken a small conflict and turned it into a much bigger one. As time passed, a clearer picture emerged of what had really been happening in the south Serbian province. Unrest had started in Kosovo in 1996, and was aggravated by the violent overthrow of the Berisha government in neighbouring Albania in the spring of 1997. Many pro-Hoxha Communists and gangsters had sought refuge in Kosovo under Berisha, and in the violence in Albania, army barracks were raided, causing a flood of weaponry into private hands. These nourished the drug-running and terrorist activities of the secessionist guerrilla force, the Kosovo Liberation Army, which was condemned for its 'acts of terrorism' by the United Nations Security Council in 1998.[38]

The Yugoslav authorities fought the insurgency. According to their figures, the KLA campaign involved thousands of attacks against citizens, state officials, police, soldiers and others. In the first ten months of 1998, 152 citizens were killed, of which 69 were Albanian, 37 Serbs and Montenegrins, 3 gypsies and 42 persons whose identity was not established: 'The murders were committed in cruel and ruthless ways, often in front of the members of their families or in front of the peasants in order to scare the population and in order to make them participate in the terrorists' actions.'[39] As one vehemently anti-Milošević British journalist admits, the KLA 'smuggled drugs,

38. UN Security Council Resolution 1160, 31 March 1998, and 1199, 23 September 1998.
39. 'The Autonomous Province of Kosovo and Metohija, Facts', Federal Secretariat of Information, Novi Beograd, 1998, p. 47

ran prostitution rackets and murdered civilians'.[40] Even the ICTY's own later indictments confirmed this, showing that the Yugoslavs were subjected to the most horrible provocations. The indictment issued in 2005 against the then prime minister of Kosovo, Ramush Haradinaj and his deputy, Idriz Balaj, contains the following allegation about a KLA murder of a pro-Yugoslav Albanian in August 1998:

> While detained, Sali Berisha's nose was cut off, in the presence of Idriz Balaj and of two other KLA soldiers. Idriz Balaj cut each of the three men on their necks, arms and thighs, rubbed salt into the cuts and sewed them up with a needle. Idriz Balaj then wrapped Zenun Gashi, Misin Berisha and Sali Berisha in barbed wire and used an implement to drive the barbs of the wire into their flesh. Idriz Balaj also stabbed Zenun Gashi in the eye. The three men were then tied behind Idriz Balaj's vehicle and dragged away in the direction of Lake Radonjic/Radoniq. They have not been seen alive since this day and are presumed to have been killed.[41]

In June 2005, Haradinaj was granted provisional release from The Hague, after spending only a few months incarcerated there.[42] He had handed himself over in March. This lenient treatment stands in sharp contrast to the ICTY's refusal to grant Milošević provisional release even though he was terminally ill. It could be connected to the fact that, although accused of rape, murder and persecution of Serbs and loyal Albanians, Haradinaj was 'the key US military and intelligence asset in Kosovo during the civil war and the Nato bombing campaign that followed'.[43] In 2005, the UN administrator of Kosovo, Søren Jessen-Petersen, who helped Haradinaj return to Kosovo, described him as 'a partner and friend'.[44] By the

40. Marshall, *Shadowplay*, p. 29.
41. *ICTY Prosecutor* v. *Ramush Haradinaj, Idriz Balaj, Lahi Brahimaj*, Indictment, 4 March 2005.
42. 'Hague court grants Kosovo ex-PM provisional release', *Reuters*, 7 June 2005.
43. 'US "covered up" for Kosovo ally', Nick Wood, *Observer*, 10 September 2000.
44. Quoted by Stefanie Bolzen in *Die Welt* on 13 June 2006.

same token, Naser Orić, a notorious Bosnian Muslim warlord at Srebrenica, was released on 30 June 2006, having been given a token two-year sentence which he was deemed already to have served, even though Prosecution witness General Morillon had testified in the Milošević trial that Orić attacked Serb villages on Orthodox holidays, massacring all the inhabitants: 'He reigned by terror … He admitted killing Bosnian Serbs every night.'[45]

Even the prosecuting counsel in the Milošević trial, Geoffrey Nice, described the KLA in his opening speech for the Prosecution as having 'advocated a campaign of armed insurgency and violent resistance to the Serbian authorities, and indeed in 1996, mid-1996, started launching attacks primarily on Serbian police forces … .'[46] For that matter, the indictment itself could not have been issued unless the KLA had been a powerful fighting force. In 2004, the ICTY had ruled that, for the purposes of international law, there was an 'armed conflict' in Kosovo precisely because the KLA was a proper army, highly organised and awash with guns.[47] By the same token, in 1999, NATO's Secretary-General, George Robertson admitted that 'Up until Račak earlier this year [mid-January 1999] the KLA were responsible for more deaths in Kosovo than the Yugoslav authorities had been.'[48]

During the first three months of 1999, moreover, numerous applications for political asylum were made by ethnic Albanians from Kosovo to the Federal Republic of Germany. The German Foreign Ministry systematically advised the courts to turn down

45. Trial transcript, 12 February 2004, p. 31965, p. 31966, p. 32044.
46. Milošević Trial, transcript, 13 February 2002, p. 140.
47. *Prosecutor* v. *Slobodan Milošević*, Trial Chamber Decision on Motion for Acquittal, 16 June 2004, paragraphs 14–40.
48. UK Parliament, Select Committee on Defence, 24 March 1999, Examination of Witnesses (Questions 380–99), Rt. Hon George Robertson and others, at paragraph 391. See also the OSCE Report, 'As seen, as told', for a comprehensive account of the conflict including KLA tactics.

these applications on the grounds that the Albanians were not suffering persecution: 'An explicit political persecution of the Albanian population cannot be established, even in Kosovo … The actions of the security forces are not directed to Kosovo Albanians as an ethnically defined group but instead against military opponents and their real or supposed supporters'[49] and, in another observation:

> The entire action of the Yugoslav military and police since February 1998 was directed against separatist activities and does not indicate the persecution of the whole ethnic group of Albanians, whether in Kosovo as a whole or in parts of the province … A state programme of persecution directed against the whole ethnic group of Albanians has not existed and does not exist.[50]

The KLA guerrillas adopted the classic tactic of insurgents throughout history, committing atrocities against civilians and the security forces in order to provoke those forces into excessive retaliation and thereby seal popular resentment against them. The KLA became notorious for the brutality of its murders and the swiftness with which it exacted revenge. On 14 December 1998, for instance, KLA gunmen shot dead six Serb youngsters innocently playing pool in the Panda café in Peć, in retaliation for the death of thirty of their men in a fight with the Serb police earlier that day.[51] (The Prosecutor Geoffrey Nice tried to prevent Slobodan Milošević from producing photographs of this atrocity during the trial, claiming that they were intended to 'sensationalise and excite the imagination unnecessarily'.[52] Yet he himself, in his opening speech for the Prosecution, had

49. Administrative Court, Trier, 12 January 1999 [Auskunft des Auswärtigen Amtes vom 12. Januar 1999 an das Verwaltungsgericht Trier (Az: 514–516.80/32 426)].
50. Urteil des Bayerischen Verwaltungsgerichtshofs vom: 29. Oktober 1998 (Az: 22 BA 94.34252). See also Urteil des Oberverwaltungsgerichts Münster vom 24. Februar 1999 (Az: 14 A 3840/94.A): Urteil des Oberverwaltungsgerichts Münster vom 11. März 1999 (Az: 13A 3894/94.A).
51. Marshall, *Shadowplay*, p. 47.
52. Trial transcript, 27 April 2005, p. 38899.

told a highly emotive and unverifiable story about a baby crying itself to death during the Bosnian war, absurdly claiming that 'of course' Milošević knew about this.[53])

The KLA were none the less presented in the Western media and by Western politicians as brave and respectable allies. The alliance between them and the Americans was glamourised even more than the similar alliance between the Americans and the Contras in Nicaragua in the 1980s. Madeleine Albright was photographed kissing the KLA leader, Hashim Thaci (whose gangster nickname is 'The Snake'); Tony Blair met him; while Jamie Rubin, the US State Department spokesman, who had already struck up a rapport with Thaci because of their mutual love of Armani suits, was happy to swagger around the streets of Priština with him, the two men both wearing the same Mafioso-style uniform of black leather jackets, white T-shirts and sunglasses. In fact, it was not only US government officials who showed a predilection for imitating the manners of the Mafiosi. On 10 July 1997, the British SAS shot dead an ICTY indictee, a Bosnian Serb named Simo Drljaća, and bundled his body into a helicopter together with his 14-year-old son who had watched his father die. But the Chief Prosecutor, Louise Arbour, seemed unembarrassed by the fact that the arrest had gone so horribly wrong. Instead, she was 'pleased': 'In the region, everyone felt a little chill,' she said. 'The next time we arrived in town … we were perceived as pretty serious and pretty scary people. Which is what we are supposed to be.'[54]

Like the Contras, the KLA were funded and trained by the Americans, as was admitted by the Prosecution during the Milošević trial. Geoffrey Nice told the court that the CIA's favourite 'deniable' private security company, Military Professional Resources Incorporated or MPRI, had trained the KLA guerrillas and infiltrated the Kosovo Verification Mission,

53. Trial transcript, 12 February 2006, pp. 12–14.
54. Chris Stephen, *Judgement Day: the Trial of Slobodan Milošević*, Atlantic Books, London, 2004, p. 133.

which reported on alleged atrocities committed by the Serbs: 'It is accepted that there were present in the Kosovo Verification Mission at least some people who had been trained by or had experience with the American organisation MPRI, and I do not challenge that members of the KLA may have been trained by such people.'[55]

The NATO-KLA alliance of course influenced the issuing of the indictment against Milošević. The same intelligence services who were funding and training the KLA were also 'informing' the ICTY Prosecutor about alleged atrocities committed by Serbs. David Scheffer, the former US Ambassador for War Crimes, the intellectual author of the concept of 'international judicial intervention'[56] and one of the driving forces behind the creation of the ICTY, has spoken at length and in public about the decisive collaboration between the Office of the Prosecutor (OTP) and the CIA.[57] Indeed, the role of the secret services in drawing up the indictment against Milošević was admitted by Prosecution staff during the trial itself.[58] During the Kosovo war, in any case, Western governments had been happy to boast that their intelligence agencies were cooperating with the ICTY. Paris, London and Washington appointed special representatives for cooperation with the ICTY whose job was prepare the 'regular transfer of intelligence and other information to the Office of the Prosecutor'.[59] The US State Department spokesman, Jamie Rubin (whose wife, CNN's star correspondent Christiane Amanpour, provided much of the coverage of Kosovo for CNN) spoke of the OTP and the US government in the same breath when, describing how the US

55. Trial transcript, 24 November, 2004, p. 33849.
56. David Scheffer, 'International Judicial Intervention', *Foreign Policy*, Spring 1996.
57. David Scheffer spoke on this at the International Conference on the Trial of Slobodan Milošević held in Galway on 29 and 30 April 2006.
58. Graham Blewitt's testimony, Trial transcript, 30 October 2003, p. 28341.
59. 'Tribunal Update 124, (Last Week in The Hague, 3–8 May 1999)', by Mirko Klarin, Institute of War and Peace Reporting, 9 May 1999.

government was providing information to the investigators, said, 'We have what we need and we think we can provide a compelling case.'[60] During the Milošević trial, moreover, the ICTY judges allowed the US government to censor the transcript of the evidence given by General Wesley Clark, the former Supreme Commander of NATO, before it was released to the public, on the grounds that the ICTY was itself dependent on information received from governments and therefore there had to be a quid pro quo.[61]

Cooperation between NATO and the ICTY Prosecutor was also discussed at the Alliance's fiftieth anniversary summit, held in April 1999 while the bombing of Yugoslavia was in full swing. The Chief Prosecutor, Louise Arbour, stated on 21 April 1999, 'I welcome the announcement of the German and British Governments that they will … provide *intelligence-based information* to my Office.'[62] NATO General Secretary George Robertson said that OTP investigators would enter Kosovo embedded with NATO troops: 'The military forces could be tasked to make sure that evidence is collected.'[63] The US Department of State announced a $5 million 'reward' for information leading to the arrest, transfer or conviction of ICTY indictees (even if this reward was never paid out).[64]

On two famous occasions in 1999, while the NATO bombing raids were in full swing, NATO spokesman Jamie Shea was asked about NATO's relations with the ICTY, that is, whether NATO recognised the jurisdiction of the ICTY itself. He replied:

> I believe that when Justice Arbour starts her investigation, *she will because we will allow her to* … If her court, as we want, is

60. Tribunal Update 126, 27 May 1999, by Mirko Klarin, IWPR.
61. Transcript, 15 December 2003, p. 30368.
62. ICTY Press Briefing, 21 April 1999, emphasis added.
63. 'Tribunal Update 123, (Last Week in The Hague, 26–30 April 1999), by Mirko Klarin, IWPR, 2 May 1999, emphasis added.
64. US Department of State, Press Statement by James P. Rubin, Spokesman, 24 June 1999.

> to be allowed access [to Kosovo], it will be because of NATO so NATO is the friend of the Tribunal … *NATO countries are those that have provided the finance to set up the Tribunal, we are amongst the majority financiers* … I am certain that when Justice Arbour goes to Kosovo and looks at the facts she will be indicting people of Yugoslav nationality and I don't anticipate any others at this stage.[65]

The next day, another journalist asked a similar question, in the light of the fact that Yugoslavia had tried to take NATO to the International Court of Justice. (NATO member states refused to accept the ICJ's jurisdiction and the case was never heard.) Shea replied:

> As you know, without NATO countries there would be no International Court of Justice, nor would there be any International Criminal Tribunal for the former Yugoslavia because NATO countries are in the forefront of those who have established these two tribunals, who fund these tribunals and who support on a daily basis their activities. We are the upholders, not the violators, of international law.[66]

During the Milošević trial, moreover, the Prosecuting counsel, Geoffrey Nice, himself inadvertently admitted that the ICTY was the creation of Western states when he was asking a Defence witness about an article written by a Serb author: 'So would you accept that this is a Serb without any particular leaning *towards the forces and powers that established this Tribunal*?'[67] Indeed, the relationship was explained with perfect clarity by Judge Gabrielle Kirk McDonald, the then President of the ICTY; she proudly told the United States Supreme Court, 'We benefited from the strong support of concerned

65. Press Conference given by NATO Spokesman, Jamie Shea and SHAPE Spokesman, Major General Walter Jertz, NATO HQ, Brussels, 16 May 1999 <www.nato.int/kosovo>, emphasis added.
66. Press Conference given by NATO Spokesman, Jamie Shea and SHAPE Spokesman, Major General Walter Jertz, NATO HQ, Brussels, 17 May 1999 <www.nato.int/kosovo>.
67. Transcript, 24 January 2005, pp. 35550–51, emphasis added.

governments and dedicated individuals such as [US] Secretary [of State] Albright. As the permanent representative to the United Nations, she had worked with unceasing resolve to establish the Tribunal. *Indeed, we often refer to her as the "mother of the Tribunal"*.'[68]

Much ICTY funding comes from the US government or its agencies such as the Orwellian-sounding United States Institute for Peace. There has also been funding from George Soros' Open Society Institute, the head of whose office in Kosovo was a strong supporter of the Albanian cause, and there have been other private donations. In an astonishing speech entitled 'The Dividends of International Justice,' given to an audience at the London offices of the investment bank Goldman Sachs on 6 October 2005, Carla del Ponte rattled the begging-bowl and said that the work of the ICTY was intended to deliver profits to private companies:

> It is dangerous for companies to invest in a State where there is no stability, where the risk of war is high, and where the rule of law doesn't exist. This is where the long term profit of the UN's work resides. We are trying to help create stable conditions so that safe investments can take place. *In short, our business is to help you make good business* … International justice is cheap … Our annual budget is well under 10% of Goldman Sachs' profit during the last quarter. See, I can offer you high dividends for a low investment.[69]

The Muslim states of Pakistan and Malaysia had alone provided 93.4 per cent of the ICTY's funding by 15 July 1994 ($3 million out of a total budget of $3,208,900); this was a reflection of the strong support given by Muslims around the world to the Bosnian Muslims' war against the Christian Serbs and Croats.

68. Remarks at the United States Supreme Court, Washington DC, 5 April 1999, by Her Excellency Judge Gabrielle Kirk McDonald, President, International Criminal Tribunal for the former Yugoslavia, on the Occasion of Receiving the ABA CEELI Leadership Award, ICTY Press Release Archive <www.un.org/icty>. Emphasis added.
69. See ICTY Press advisory, 7th October 2005. The text of the speech is available on the ICTY website, emphasis added.

However, the balance was eventually tipped strongly in favour of the US. In 2005, the US gave $17 million, four times the amount of the next largest contribution of $4 million from the European Commission. This pattern has been repeated every year since 2000. (The annual budget of the ICTY has been over $200,000,000 since 2002 and was over $276,000,000 for 2006–07. This compares to the budget of the International Court of Justice, which was $34,832,300 in 2005, one-eighth of that of the ICTY.)[70]

This harmony of interests between NATO and the ICTY, and the financial dependency of the latter on the former, came to fruition in 2000 when the ICTY Prosecutor refused to open an investigation into whether NATO had committed any war crimes during its attack on Yugoslavia.[71] She produced a report on the matter,[72] having created 'a committee' within her office to look into various complaints received from a variety of sources, and the report concluded that NATO had no case to answer.

One of the main arguments was that the ICTY has no jurisdiction over the crime of aggression, whereas in fact it patently should have claimed such jurisdiction, since 'crimes against peace' had been an integral part of the laws of war since Nuremberg. The Prosecutor also stated that the military strikes of NATO had produced no infractions of *ius in bello*, the laws of war, even though the atrocities and war crimes committed by the Alliance had been well documented by Amnesty International and others.[73] NATO had carried out

70. Report of the International Court of Justice to the General Assembly of the United Nations, 1 August 2004–31 July 2005, p. 74.
71. ICTY Press Release, 13 June 2000.
72. 'Final Report to the Prosecutor by the Committee Established to Review the NATO Bombing Campaign Against the Federal Republic of Yugoslavia', ICTY Press Release, 13 June 2000.
73. Amnesty International, 'NATO/Federal Republic of Yugoslavia, "Collateral damage" or Unlawful Killings?, Violations of the Laws of War by NATO during Operation Allied Force,' AI Index, 70/18/00, June 2000.

widespread and deliberate attacks on a whole range of civilian targets, a very great number of which had absolutely nothing to do with military necessity; there was no doubt that some of the most sensitive targets – such as the studios of Radio Television Serbia, the attack on which killed several night-shift staff and make-up artists – had been deliberately chosen and approved at the highest level. NATO top brass and political leaders of the NATO states confirmed that this was the case at the time.[74] US Air Force General Michael Short specifically stated that the purpose of the war was to force the civilian population to rebel against the policies of the Yugoslav government.

To the extent that the Office of the Prosecutor ever really considered opening an investigation into its friends and sponsors in NATO, it is obvious that pressure was exerted by NATO states to prevent such a move. David Scheffer, then US Ambassador for War Crimes, has admitted this.[75] The Prosecutor herself, Carla del Ponte, told Judge Antonio Cassese, the ICTY President, that she could not possibly initiate an investigation into NATO or the whole of her sources of information from Western governments for the Milošević indictment would dry up.[76]

The Office of the Prosecutor's refusal to open an investigation terminated conclusively any claim it may have had to independence. The NATO attack on Yugoslavia was indisputably illegal under existing international law.[77] Very few supporters of the Kosovo war, indeed, even tried to argue that it was legal. They said instead that it was legitimate even if illegal,[78] a very strange way indeed to defend the rule of law.

74. 'Serb TV station was legitimate target, says Blair', Richard Norton-Taylor, *Guardian*, 24 April 1999.
75. Scheffer speaking at the International Conference on the trial of Slobodan Milošević, Galway, 29–30 April 2006.
76. Author's private information.
77. 'Kosovo Crisis Inquiry: Memorandum on the International Law Aspects' by Professor Ian Brownlie, CBE, QC, 6 October 1999.
78. UK Parliament Foreign Affairs Select Committee, report, 23 May 2000, paragraph 128; Antonio Cassese, 'Ex iniuria ius oritur: Are we moving

Western governments' contemptuous attitude to the law was only underlined when, in the aftermath of the Kosovo war, no attempt was made to change international law by drawing up an international treaty, which would permit humanitarian intervention. In fact, there is nothing universal about Western states' claim to support universal human rights. Instead, the claim is based on the assumption that some states are more civilised than others. Just as empires throughout history have identified themselves with universal human values, so President George W. Bush has declared on several occasions that the United States has a special historic mission to spread the universal value of liberty around the world[79] and indeed to lead the world. When the British Foreign Secretary Robin Cook was asked whether the newly constituted International Criminal Court might one day indict Western leaders for their decisions to go to war, he retorted, outraged, 'If I may say so, this is not a court set up to bring to book Prime Ministers of the United Kingdom or Presidents of the United States.'[80] By the same token, when he coined the term 'international judicial intervention' in 1996, the future US Ambassador for War Crimes, David Scheffer, said that it would be the 'shiny new hammer' in '*the civilised world's* box of foreign policy tools'.[81]

Tribunals, which are but an instrument of diplomacy in the hands of powerful states, are in fact not administering law at all, but instead providing spurious cover for their paymasters, thereby prostituting the legal process itself. Following the

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towards international legitimation of forcible humanitarian countermeasures in the world community?', *European Journal of International Law* 10 (1999) pp. 23–30. International Commission on Kosovo, 'The Kosovo Report', 1 October 2000, Executive summary.

79. For example, Bush's second inauguration speech, 20 January 2005.
80. Cook was speaking on BBC2's 'Newsnight' in late August 2000. See John Laughland, 'Forget the rhetoric, this court is just another excuse for superpower bullying', *The Times*, 29 August 2000.
81. Scheffer, 'International Judicial Intervention', p. 51, emphasis added.

attack on Iraq in 2003 and the creation of the detention camp at Guantánamo Bay, whose inmates are denied the status of prisoners of war according to the old sovereignty-based laws of the Geneva Conventions, there is wide understanding of how an appeal to overriding moral imperatives, such as 'the war on terror', can lead quickly to degradation of the legal process. That tendency started on 24 March 1999, when NATO's bombs started to fall on Serbia, and was confirmed in the new canon of emerging 'international criminal justice', when the indictment was issued against Milošević.

2
The New World Order

From Iraq to Yugoslavia and back again

ALTHOUGH THEY REPRESENTED a radical break with the international order established after the Second World War, the Kosovo war and the indictment against Slobodan Milošević did not come entirely out of the blue. Instead, supranational ideas had been brewing for a decade, mainly encouraged by new thinking emanating from Washington DC. On 11 September 1990, President George H.W. Bush proclaimed 'a new world order' in a speech to Congress,[1] a portentous phrase, which had originally been introduced into political discourse by the Soviet leader, Mikhail Gorbachev, in a speech to the United Nations General Assembly on 7 December 1988. Gorbachev had argued for the bipolar system to be overcome, for the world economy to be united, for the United Nations to be strengthened and for conflicts to be managed by superpower cooperation.

Bush's use of the phrase 'new world order' was the same as Gorbachev's. He used the term with reference to the 'international community's' planned reaction to Iraq's invasion of Kuwait, saying that the crisis would provide an opportunity for a world to emerge 'where the rule of law supplants the rule of the jungle. A world in which nations recognize the shared responsibility for freedom and justice. A world where

1. 'Toward a New World Order', President George H.W. Bush, Speech to Congress, 11 September 1990.

the strong respect the rights of the weak. This is the vision that I shared with President Gorbachev in Helsinki.'

Bush meant specifically that the United States' and its allies' determination to repel Iraqi forces from Kuwait had been approved by the United Nations Security Council and that therefore, for the first time since the Cold War, international law would be enforced by means of military violence. Whereas international law had previously consisted essentially of the contractual agreements between states, in the form of treaties and with no superior power of enforcement, henceforth in 'the new world order', states would be forced to comply with UN Security Council Resolutions. International law would lose its 'horizontal' and consensual structure and become vertically structured and coercive. As the ICTY's Chief Prosecutor Louise Arbour was to put it in August 1999, 'We have passed from an era of cooperation between states into an era in which states can be constrained.'[2]

This view soon became embodied in the doctrine of 'rogue states', which was to form the bedrock of US foreign policy philosophy under Presidents Clinton and Bush Junior. According to this theory, the states of the world are divided into various categories, with the US and its allies at the centre, then various other countries in various other categories of alliance or semi-alliance, and so-called 'rogue states' at the outer periphery, whose outlaw and rebellious behaviour the 'international community' must constrain.

The United States and its allies were mandated by UN Security Council resolutions in 1990 and 1991 to mount a counter-attack and to repel Iraqi forces from Kuwait. This was not in itself evidence of new supranational thinking. At least it was consistent with the principle, enshrined in the UN Charter, that sovereignty is the cornerstone of the international system. Allied forces claimed to be acting to protect Kuwaiti

2. 'L'ère de "la contrainte des états" s'est ouverte, estime Louise Arbour', *Le Monde*, 6 August 1999, p. 4

sovereignty. However, the resolutions upon which the Security Council was to vote over the next few months in 1991 did confirm that a new doctrine of humanitarian intervention was emerging. Resolution 688, passed on 5 April 1991, condemned 'the repression of the Iraqi civilian population, including most recently in Kurdish populated areas, the consequences of which threaten international peace and security in the region'. For the first time, the internal affairs of a state were said to represent a threat to international peace. Chapter 7 of the UN Charter allows the Security Council to take measures in responses to such 'threats to the peace' (Article 39), and so by making this declaration, the Security Council was opening up the legal possibility of intervention.

This duly occurred when the United States and the United Kingdom, in the absence of any further UN resolution instructing them to do so, proclaimed two no-fly zones over northern and southern Iraq, ostensibly to protect the civilian population in those regions. The proclamation of these no-fly zones lifted the curtain on a decade-long low-level war conducted against Iraq by the US and the UK, which flew tens of thousands of sorties and bombed targets in these zones on thousands of occasions. A draconian sanctions regime, combined with highly intrusive weapons inspections, were also imposed on Iraq by the same UN Security Council. This state of affairs lasted until 2003, when the United States and the United Kingdom attacked and invaded Iraq.

Shortly after President George Bush Sr's speech in 1990, there were further developments towards supranationalism. In response to the collapse of the Berlin Wall and of Soviet influence over eastern Europe, the powers of the Conference on Security and Co-operation in Europe were greatly strengthened in November 1990. This organisation had been created at Helsinki in 1975, as the United States and the Soviet Union had struggled to achieve some measure of détente: its charter contained a 'basket' of commitments on human rights, and

these were used by dissidents in the Communist bloc and by those Western organisations and governments which supported them. In November 1990, in the euphoria of the collapse of Communism, the CSCE renamed itself 'the Organisation on Security and Co-operation in Europe' at a solemn conference in Versailles. The OSCE acquired a host of new human rights prerogatives, and a right to oversee the 'transition to democracy' in eastern Europe. The industry of 'transition-ology' was thereby born, and the curtain was raised on a decade of interference in the internal affairs of the newly liberated states, much of which was politically manipulated by Western governments operating via what purported to be non-governmental organisations.[3]

The underlying philosophy was the same as that which was to lead to UN Security Council Resolution 688 in 1991. Human rights violations and other internal political tensions could, it was reasoned, be a cause of instability and thus insecurity. The implication was that international organisations needed to be strengthened in order to micro-manage the internal affairs of all European states. Pretty much anything became a cause for common concern: the treatment of minorities, women's rights, human rights, ethnic relations, even labour law and social protection. Security, it seemed, could be ensured only when the whole world was subject to the same standards and policies. As one constitutional expert wrote, the OSCE was 'the source of an overarching European constitutional order to which all national and political institutions in Europe must conform'.[4]

This same philosophy had driven an even bigger project than the consolidation of the powers of the OSCE. Ever since the publication of the Delors Report in 1988, the European

3. The British Helsinki Human Rights Group <www.oscewatch.org> has spent more than a decade documenting the abuses committed by the OSCE and other supranational or non-governmental bodies.
4. Thomas Buergenthal, 'The CSCE Rights System', *George Washington Journal of International Law and Economics*, Vol. 25, No. 2, 1991, p. 380.

Union had been moving towards quasi-federal supranational integration. There had always been elements of supranationalism in the European Community but the project to abandon the national currencies of the EU member states and to replace them with one single common European currency was a far bolder step than anything which had been attempted before. This new move towards supranationalism was itself driven by the same concern for 'stability' which inspired the moves in the OSCE and, later, the creation of the ICTY. The leading politicians who supported European integration – above all, the German Chancellor, Helmut Kohl – had all argued that national rivalry would lead to new wars on the European continent. If peace was to be protected, they argued, then the states of Europe needed to be inserted into a coercive supranational order, and this was what the introduction of the euro was all about.[5]

This new supranationalism had a universal and a regional dimension. The Germans felt afraid of the new instability which would arise from the dramatic changes in the geopolitics of the European continent. The Soviet leader having told Chancellor Kohl by the banks of the Rhine in 1990 that the Soviet Union would permit the reunification of the German Federal Republic with the German Democratic Republic, policy-makers in the Federal Chancellor's office sketched out new geopolitical plans for a tightly integrated EU to act as a stabilising or federative force on the European continent, envisaging a system of 'concentric circles' with 'core Europe' at its heart and the newly free states of eastern Europe in its orbit.[6] Such plans reflected the widespread fear of what would happen when the

5. I discuss this aspect of the European ideology at length in *The Tainted Source: the Undemocratic Origins of the European Idea*, Little Brown, London, 1997.
6. This vision was originally outlined by two advisers in the Chancellor's office, Michael Mertes and Norbert Prill, in an article for the *Frankfurter Allgemeine Zeitung* entitled 'Das verhängnisvolle Irrtum eines Entweder-Oder', 18 July 1989.

states of eastern Europe were liberated from the straitjacket of Communism: many commentators were fearful that a new 'nationalism' would arise and that Europe would be plunged into instability.

As the 1990s advanced, the idea became ever more firmly embedded in the foreign policy thinking of the Western powers that nationalism and instability were the new dangers, and that proactive foreign and military policy was required to counteract them. President Bush Sr had said at Aspen, Colorado on 2 August 1990 – the day Iraq invaded Kuwait – that, with the end of the Cold War, new threats could now emerge from anywhere and that US military policy would therefore need to have a global reach. Similarly, in 1992 a leaked Pentagon document, the Defense Planning Guidance, authored by Paul Wolfowitz and Defense Secretary Dick Cheney, also argued that the United States would need to adopt a more proactive stance in foreign and defence policy, specifically by intervening in many parts of the world to prevent or pre-empt the various threats which might arise. It was in this document that the doctrine of pre-emptive war was first articulated, later to be used to justify the attack on Iraq in 2003. The approach proposed by the Pentagon officials would differ, they said, from the more reactive approach of the Cold War period, which had been based on national sovereignty and the doctrine of deterrence.[7] More generally, many commentators (especially the neo-conservatives) started to argue that only US hegemony could prevent the world from descending into chaos.

Such thinking, which contained an obviously US imperialist or nationalist element, went hand in hand with more overtly globalist thinking. While those on the right, like Wolfowitz and Cheney, did not blush to say that the goal of this new policy was to prevent the emergence of any other power to rival US hegemony, people on the left like Strobe Talbott, Deputy

7. For an excellent summary, see 'Dick Cheney's Song of America', by David Armstrong, *Harper's Magazine*, October 2002.

Secretary of State under Bill Clinton, had famously written in favour of the emergence of a world state and the disappearance of nations as meaningful political entities. Talbott wrote:

> I'll bet that within the next hundred years nationhood as we know it will be obsolete; all states will recognize a single, global authority … The internal affairs of a nation used to be off limits to the world community. Now the principal of 'humanitarian intervention' is gaining acceptance. A turning point came in April 1991, shortly after Saddam Hussein's withdrawal from Kuwait, when the U.N. Security Council authorized allied troops to assist starving Kurds in northern Iraq.[8]

In the same vein, David Scheffer, one of the intellectual heavyweights behind the International Criminal Tribunal for the former Yugoslavia (ICTY), who was to serve as Bill Clinton's Ambassador for War Crimes and who coined the term 'international judicial intervention' in 1996,[9] also revealed himself to be a supporter of international military intervention. In a seminal article in 1992, he expressed ideas about Iraq which would be used seven years later to justify a war of aggression against Yugoslavia:

> There is a critical need to re-examine humanitarian intervention in the context of contemporary events. There was a time prior to World War II when unilateral military intervention for strictly humanitarian purposes was regarded as legitimate by a large community of international law scholars and was arguably embodied in customary international law. Following World War II, the U.N. Charter's prohibition on the use of force except in cases of self-defense or at the direction of the Security Council had the effect of generally de-legitimizing humanitarian intervention … In the post-Cold War world, however, a new standard of intolerance for human misery and human atrocities has taken hold … To argue today that the norms of sovereignty, non-use of force, and the sanctity of internal affairs are paramount to the collective human rights of people, whose lives and well-being are at risk, is

8. Strobe Talbott, 'Birth of the Global Nation', *Time*, 20 July 1992.
9. David J. Scheffer, 'International Judicial Intervention', *Foreign Policy*, Spring 1996.

> to avoid the hard questions of international law and to ignore the march of history.[10]

While Iraq was the first target of such international intervention, Yugoslavia was not far behind. Fighting had broken out in Slovenia and Croatia in July 1991 and the battles in the latter republic were quite bloody. Civil war broke out in Bosnia & Herzegovina as soon as that country was pushed to declare independence by the United States and the European Union in April 1992. The fighting there lasted until 1995 and, throughout those three years, many people became convinced that 'ethnicity' had made a sudden reappearance as the principal cause of the war and as a major factor for instability. There was little attempt to explain the properly political motives behind the Yugoslav wars: 'nationalism' and 'ancient ethnic hatred' seemed to provide the only explanation for what was widely perceived as a totally irrational event. The opinion was widely expressed that atavistic history had returned, at the very moment when progressive countries were advancing towards the glorious sunlit uplands of supranational integration. It became a commonplace to speak, as Gerald Ford, the former US president, had done in 1995, of the Balkans as being home to 'a stubborn ethnic conflict which was ancient before I was born'.[11] Richard Holbrooke, the US special envoy to the Balkans, said that the Balkan states had to liberate themselves from 'the unresolved legacies of their own tragic, violent and angry past'.[12] The West adopted the old Communist formula, according to which 'nationalism' and even 'fascism' were the new reactionary dangers, and this perspective was projected onto Yugoslavia generally and in particular onto the person of Slobodan Milošević. Indeed, Milošević was repeatedly

10. 'Toward a Modern Doctrine of Humanitarian Intervention' by David J. Scheffer, *University of Toledo Law Review*, Vol. 23, Winter 1992.
11. His remarks were made in Helsinki on 1 August 1995.
12. Address to the spring session of the North Atlantic Assembly, Budapest, May 1995.

presented as the key figure in the various wars in the Balkans, even though the disintegration of Yugoslavia continued after he had fallen from power and even after his death: a violent ethnic Albanian uprising in Macedonia in 2002 was nearly to tear that little country apart, while the republic of Montenegro was to declare its independence from what remained of Yugoslavia in June 2006, two months after Milošević died.

Because of the apparent stability it had offered, Communism quickly became the subject of considerable expressions of nostalgia by Western figures. That regime, which had always considered itself progressive, was suddenly valued for the control it had exercised over what were viewed as the primitive peoples in the East. Just as the Soviet President, Mikhail Gorbachev, had called in 1990 for the creation of a 'European Conflict Prevention Centre', even though no conflicts had erupted anywhere at that point, so many in the West did not exactly welcome the collapse of Communism in eastern Europe. They hurried to invent new constricting supranational structures that would replace it. Jacques Poos, the foreign minister of Luxembourg and president of the European Council in 1992 said that the notion of national self-determination was 'dangerous as the basis for the international order'.[13] Since the European Union was removing the main sovereign rights from its own member states, there seemed little reason to suppose that former Communist states had any right to sovereignty or self-determination either.

The most explicit statement of this belief was made by British Prime Minister John Major in a statement to the House of Commons on 23 June 1993. Major said that the fighting in Yugoslavia and the Bosnian civil wars had been caused by 'the collapse of the Soviet Union and of the discipline which that exerted over the ancient hatreds in the old Yugoslavia'. Mr Major's speech-writers had evidently forgotten – or perhaps

13. Quoted in Mark Almond's *Europe's Backyard War*, Heinemann, London, 1994, p. 33.

they never knew – that any 'discipline' exerted by the Soviet Union over Yugoslavia had disappeared when the Yugoslav dictator, Josip Broz Tito, famously broke with Moscow in 1948. Major's remark showed that the international political elite was firmly wedded to the view that supranational structures, even dictatorial ones, were necessary to maintain peace on the European continent.

Such views led directly to the creation of the International Criminal Tribunal for the former Yugoslavia in May 1993. As over Iraq, the Security Council ruled that the human rights violations occurring on the territory of the former Yugoslavia were a threat to peace. It therefore invoked its peace-making powers under Chapter 7 to create the Tribunal. The implication, which has since been made explicit on many occasions since, is that universal peace and 'justice' need one another, an idea expressed by President George W. Bush in his second inaugural speech on 20 January 2005: 'The survival of liberty in our land increasingly depends on the success of liberty in other lands.' Previously, it had been believed that the armed forces of a state are there to protect its citizens from any evil which may exist beyond its borders, that peace can be built on injustice (as happened to eastern Europe after the end of the Second World War) and that one state can be free without all states being free.

None of these prophets of supranationalism would ever admit that the collapse of Yugoslavia had itself been micro-managed by the international community, precisely acting in the name of supranationalism. International involvement in the Yugoslav crisis began as soon as the League of Communists collapsed in 1990, when multi-party elections were held in each of the Yugoslav republics. The European Union immediately decided that the build-up of tensions inside Yugoslavia was its business. On the verge of signing the Maastricht Treaty on European Monetary Union, the EU was determined to throw its weight around in foreign affairs too. Neither the EU nor the US ever took the view that the best way to defuse the crisis

was to let the protagonists themselves sort things out. Instead, the EU and its officials immediately started to try to broke agreements, while at the same time intervening in Yugoslavia's affairs by encouraging the secessions of Slovenia, Croatia and finally Bosnia & Herzegovina. Germany famously forced the hand of the other EU states, by announcing its intention to recognise Slovenia and Croatia in late 1991, whence the existence of numerous 'Genscher cafés' in Croatia today and whence the broadcast of a cheesy pop song on Croatian TV following the war, in which a tartily dressed young woman schmoozed the words, '*Danke, Deutschland*'.

Although fighting had already broken out by then, these actions destroyed any chance of negotiation between the various parties in Yugoslavia. Those states which wanted a looser Yugoslav federation or secession were suddenly tantalised by the possibility that they could rely on diplomatic and even military help from abroad. This radicalised the political situation on the ground and introduced a dangerous imbalance into the negotiations between the Yugoslav republics. As the war raged, Croats and especially Bosnian Muslims relied heavily on international support, devoting considerable effort to presenting themselves as victims in order to consolidate and even strengthen that support. David Chandler argues convincingly that international interference itself exacerbated the conflict because it destroyed any hope that the federal mechanisms of the Yugoslav state might regulate the various disagreements between the republics. It then ensured that the Bosnian Muslims had an interest in prolonging the civil war in Bosnia: 'For the beleaguered Sarajevo government, with few resources to fall back on, fighting the war soon became of secondary importance to winning support for international intervention.'[14]

14. David Chandler, 'Western intervention and the disintegration of Yugoslavia', in *Degraded Capability: the Media and the Kosovo crisis*, eds Philip Hammond and Edward S. Herman, Pluto Press, London, 2000, p. 26.

Instead of acting on the basis that political consensus could be built only by the interested parties, and not by international agents who by definition had no accountability to the peoples of Yugoslavia, the EU and the US took it for granted that they had the right to say which Yugoslav states did or did not have the right to secede. The EU created the Badinter Commission of constitutionalists to look into the matter in 1991–92. It came up with various conditions that the Yugoslav states needed to meet before meriting international recognition. This conclusion itself begged many questions, not least whether recognition should be a factual matter, as the 1933 Montevideo Convention suggests (does the government in question actually control the territory? etc.) or a moral one. It also begged the question whether a component of a federal state has the right to declare independence from the federation unilaterally: a federation is a contract and yet a contract can legally be cancelled only by agreement between all the parties to it. Certainly the federated states of the US would have difficulty declaring their independence from the American federation, as the Confederacy discovered to its cost in the American Civil War.

International intervention had an absolutely crucial influence on the decisions of the local actors. The Bosnian Muslim president, Alija Izetbegović, withdrew his signature from the Lisbon Agreement in February 1992, following encouragement to do so by the US ambassador, Warren Zimmerman, who successfully lobbied his government to undertake 'an active American push for recognition' [of Bosnia & Herzegovina as a sovereign state] even though the Serbs, who made up a large proportion of the population, wanted the republic to remain in Yugoslavia.[15] Recognition ensued, even though few

15. Warren Zimmerman, *Origins of a Catastrophe*, Times Books, 1999, p. 192. Lord Carrington has testified in private correspondence that the US government sent a telegram to Alija Izetbegović advising him to rescind his signature on the Cutileiro agreement. So has Cutileiro himself: see his letter to *The Economist*, 9–15 December 1995.

if any of the 'conditions' previously set down by the Badinter Commission had been met. The indication that Bosnia-Herzegovina would indeed be recognised led directly to the declaration of independence, which in turn led directly to the start of the Bosnian civil war.[16] International recognition, indeed, was required to provide a legal basis for sending UN troops to Bosnia, which occurred in 1992, that is, unilaterally to dismantle the sovereignty of the existing state of Yugoslavia.

Having helped start the Bosnian civil war, the international community seemed to do everything to prolong it. Western policy was based on a determination to break up Yugoslavia, which had been multi-ethnic, and on a determination to maintain Bosnia-Herzegovina, on the basis that it was multi-ethnic. This crucial schizophrenia prolonged the conflict for three years. Logically, the collapse of Yugoslavia should have led directly to the collapse of Bosnia-Herzegovina, in which case the fighting may well have been over as quickly as it was between Yugoslavia and Croatia. Instead, the EU and the US insisted that Bosnia-Herzegovina be preserved. That fighting ended in 1995 only with even more surreal international interventionism than before: an international protectorate under a 'High Representative' was established, which, to this day, is the only thing which holds together an entirely bogus state.[17] The internally divided state of Bosnia & Herzegovina exists only on paper, and only to the extent that the constituent peoples are in fact not governed by it at all.[18]

Similar crass inconsistencies bedevilled the West's attitude to the other conflicts in the Balkans, the only common

16. See Robert M. Hayden, *Blueprint for a House divided: the constitutional logic of the Yugoslav conflicts*, University of Michigan Press, Ann Arbor, MI, 2000, Chapter 5.
17. See David Chandler, *Bosnia, Faking Democracy after Dayton*, Pluto Press, London, 1999.
18. On the history of international intervention as a factor in the break-up of Yugoslavia, see Chandler, 'Western Intervention and the Disintegration of Yugoslavia', pp. 19ff. See also Hayden, *Blueprint for a House Divided*.

denominator being an apparent hatred for Serbs. The West berated the Bosnian Serbs for withdrawing from the political institutions of Bosnia & Herzegovina in late 1991, but praised the Kosovo Albanians for withdrawing from the institutions of Serbia and Yugoslavia throughout the 1990s. It then in turn berated the Kosovo Serbs for withdrawing from Kosovo's Albanian-dominated institutions in 2006.[19] The West said that Croatia, Slovenia and Bosnia & Herzegovina had the unilateral right to secede from Yugoslavia in 1991–92, but not that Serbs in Bosnia had the right in 1992 to secede from a new state whose authority they had never recognised. The creation of the mono-ethnic sovereign state of Slovenia was encouraged in 1991 precisely because it was mono-ethnic, whereas Bosnia & Herzegovina was artificially preserved as a state after 1992 precisely because it was supposedly multi-ethnic. In 2006, the West welcomed the referendum organised in Montenegro, which led to that country's independence from Belgrade but strongly opposed a proposal by the Bosnian Serbs in Republika Srpska to hold a referendum on their independence from Bosnia & Herzegovina.[20]

As the 1990s advanced, this supranational ideology continued to gain influence, in spite of the horrendous damage it had inflicted and in spite of its evident inconsistencies. The establishment of the Bosnian protectorate was itself the logical conclusion of the assumption that only international agents, inspired by the non-political ideologies of the free market and human rights, were appropriate forms of government for quarrelsome peoples. States, by contrast, were regarded as inherently unstable and as inherently criminal. To deal with this perceived problem, the Treaty of Rome was signed in July 1998, which brought into being the new International Criminal Court. The International Criminal Tribunals for

19. See for instance the short news item, 'UN Envoy Urges Kosova's Serbs to Engage in Political Life', Radio Free Europe Newsline, 12 June 2006.
20. 'EU opposes Bosnian referendum', *ISN Security Watch*, 30 May 2006.

Yugoslavia and Rwanda having been created in 1993 and 1994, it was now felt that a permanent international criminal court was needed to keep would-be tyrants in check. Although the manner of the ICC's creation conformed to the traditional practices of international law (a treaty was drawn up and presented for voluntary signature and ratification by states), the thinking underlying the creation of the ICC was the same as that which inspired the ICTY, namely that acts of state needed to be brought under the control of a supranational body.

The same ideas also lay behind the detention in London in October 1998 of the former Chilean president, Senator Augusto Pinochet Ugarte. A Spanish judge had lodged an extradition warrant with the British authorities, indicting Pinochet for criminal acts committed by the regime of which he was president from 1973 to 1990. The case went though various legal wrangles in the British courts and Parliament, with appeals and counter-appeals. Although General Pinochet was eventually sent home on medical grounds, the House of Lords ruled that the Spanish extradition warrant was justified, that is, that a Spanish court would have the right, under the terms of the UN Convention against Torture, Other Cruel, Inhuman or Degrading Treatment or Punishment, which entered into force on 26 June 1987, to prosecute Pinochet. In other words, the courts of Spain, the former colonial power, had the right to adjudicate what had been done by Chileans to Chileans in Chile. (The House of Lords' ruling that the Torture Convention applied meant that acts committed after 1987 could be so adjudicated. The initial application for extradition had been issued by the Spaniards on the basis that the Chilean authorities had committed offences against Spanish citizens. But there were no allegations of torture against Spanish citizens after 1987, so if the case had ever come to court only acts committed against Chileans would have been adjudicated.) The decisive ruling on Pinochet was issued on 24 March 1999 – the very day NATO started to bomb Yugoslavia.

The confusion between state sovereignty and government power

To many people, it seems obvious that there should be an international court to prosecute crimes committed under the protection of national sovereignty. This, of course, is the philosophy of both the ICTY and of the Kosovo war. Yet this premise rests on one simple error of perspective, the confusion between national sovereignty and the power of a state's government. Because national constitutions typically give de jure and de facto immunity to state leaders, especially the head of state, people conclude that national sovereignty is nothing but a legal fiction to protect unscrupulous or even murderous leaders. As the ICTY Appeals Chamber has itself declared, 'Borders should not be considered as a shield against the reach of the law and as a protection for those who trample underfoot the most elementary rights of humanity.'[21]

This view is based on a mistaken understanding of sovereignty. State sovereignty means constitutional independence: it means that the body of rules that governs the exercise of political authority within a particular state does not depend on the rules of any other state. A sovereign state can be big or small, powerful or weak. Its government can be law-abiding or criminal. The apparatus of the state as a whole can either control the head of state or be controlled by him or her. All that sovereignty does is to provide the conceptual framework, which gives the state legal personality and shows the mechanisms by which power is exercised. A sovereign state can sign treaties with other states and thereby give itself duties and rights; the government of a sovereign state can be bound by various forms of internal or external constraint. But it is only when the lines of responsibility, which the doctrine of state sovereignty describes, are clear that such arrangements can be made.

21. *Prosecutor* v. *Tadić*, Appeals Chamber Decision on the Defence Motion for Interlocutory Appeal on Jurisdiction, 2 October 1995, paragraph 58.

The doctrine of state sovereignty does not imply, and has never implied, unlimited power for the government. It simply means that all political orders have at their apex a point at which power is unimpeachable. In most states we can say where the buck stops: in democracies, it stops with 'the people', in monarchies with the king. But the fact that we can say that this or that institution holds the ultimate unimpeachable power is itself a conclusion we can reach only by accepting the doctrine of state sovereignty, which describes by what mechanisms power is wielded in a state. Sovereignty is a property of states, not of particular institutions or people within states.[22]

This basic fact about sovereignty can be seen by examining any criminal justice system. The duty and right to prosecute and punish criminals is one of the core attributes of statehood. All criminal justice systems have unimpeachability at their apex. If you are convicted of a crime, you can usually appeal to a higher court, but there will always be a point at which the appeals process stops. If there did not exist such a point, then there would not be a criminal justice system at all, there would simply be anarchy. This means that the decisions of the officials who administer this ultimate stage of the criminal justice system, typically judges, cannot be subject to further appeal or judicial scrutiny. This is what is known as legal immunity.

Legal immunity exists in all criminal justice systems, just as it exists in all states. This is because it is itself the expression of the existence of a jurisdiction. This elementary and inevitable fact about all systems of criminal justice and political authority can be seen from the fact that even the judges of the ICTY – a tribunal which boasts that it is 'spearheading the shift from impunity to accountability' on its own website – themselves enjoy legal immunity from appeal or prosecution for decisions

22. I discuss these issues at length in *The Monist*, January 2007. The issue is devoted to the concept of sovereignty.

taken in their capacity as ICTY judges (Article 30 of the ICTY Statute). (The ICTY also offers immunity from prosecution to certain witnesses who may be afraid of travelling to The Hague to give evidence and then being arrested as suspects.) The right of the ICTY judges to perform their duties without interference from other jurisdictions was actually raised by Judge Bonomy during the Milošević trial, when he expressed resentment that the Dutch Bar Association had tried to impugn the ICTY's decision taken in 2004 to impose defence counsel on Slobodan Milošević.[23]

Supporters of international criminal law love to elide the two words 'immunity' and 'impunity', as if they were the same thing. They are not. The difference was made clear by an important ruling of the International Court of Justice in 2001. In 2000, Belgium had issued an arrest warrant for Abdulaye Yerodia Ndombasi, the then foreign minister of the Democratic Republic of Congo. He was said to have been involved in war crimes, and Belgium had declared that its jurisdiction covered such crimes, wherever they were committed. Congo responded by taking Belgium to the ICJ, whose jurisprudence is of a far higher quality than that of the ICTY. In conformity with existing international law, which states firmly that there is no universal jurisdiction and no right of humanitarian intervention,[24] the ICJ found against Belgium and instructed it to withdraw the arrest warrant:

> The Court emphasizes, however, that the immunity from jurisdiction enjoyed by incumbent Ministers for Foreign Affairs does not mean that they enjoy impunity in respect of any crimes they might have committed, irrespective of their gravity. Immunity from criminal jurisdiction and individual criminal responsibility are quite separate concepts. While jurisdictional immunity is procedural in nature, criminal responsibility is a question of substantive law. Jurisdictional immunity may well bar prosecution for a certain period or

23. Trial transcript, 9 November 2004, p. 33211.
24. See especially the ruling in *USA* v. *Nicaragua*, 1986.

> for certain offences; it cannot exonerate the person to whom it applies from all criminal responsibility.[25]

Legal immunity, in other words, is simply the expression of the existence of a jurisdiction, which has its own procedures for bringing criminal prosecutions. No doubt immunity is often abused to ensure impunity, but the fact that a system is abused at the national level does not mean it cannot be abused at the international level as well.

This power of unimpeachable decision making (judgement) is certainly an awesome one. It imposes grave responsibilities. Many political philosophers have argued that these responsibilities are akin to those incurred in a contract – that state power is enjoyed as part of an implicit contract between the state and the people, or between the people themselves to live together in a state. State power, it is argued, is counterbalanced by a duty on the state to protect its citizens.

The only way to realise this implicit contract is to embed the criminal justice system in the other functions of statehood. In a state, the criminal justice system operates together with the other organs of the state, especially its legislative ones. Moreover, it is bound to the people over whom it wields power by institution, custom, culture and history. It is part of the overall political regime in force.

There may be cases of abuse. In such cases, there is at least the possibility of ensuring political change through various forms of campaigning or political struggle. Even a dictatorial state apparatus is ultimately rooted in the people it governs, as a product of that state's collective history. By contrast, there is no such link between an international tribunal and the people over whom it has jurisdiction. The possibilities of its subjects bringing political pressure to bear if there are abuses are hugely limited, precisely because its power comes from

25. Case concerning the Arrest Warrant of 11 April 2000 (*Democratic Republic of Congo* v. *Belgium*), Judgment, 14 February 2000, paragraph 60, emphases original.

'on high'. The ICTY is a subsidiary organ of the UN Security Council; there is no organic link between it and the peoples of the former Yugoslavia by any legislative or executive organs; the judges and other officials who work for it do not even speak the Yugoslav languages; the Tribunal is not connected to a state which has the power to protect the people over whom it has jurisdiction. Consequently, whereas the social contract linking the power to the people is sometimes broken at the national level, it is always and systemically broken at the international level.

The logic of sovereignty can therefore never be avoided. However many safeguards you try to put on political power, you will always come back to the oldest question of political philosophy, 'Who guards the guardians themselves?'

3
Inverting Nuremberg

THIS RISE IN supranational ideology, and especially the subjection of international relations to the criminal law, had one overriding source of alleged legitimacy: the Nuremberg trials. They seem to offer the perfect vindication of the war waged against Yugoslavia. Just as the Allies had attacked Nazi Germany and then found its leaders guilty of horrendous crimes, so Yugoslavia's leader would be put on trial following the Serbs' ethnic barbarism. The fact that the Allies sat as an international tribunal in judgement over the defeated Nazis consolidated in many people's minds the idea that international organisations embody a higher morality than the narrower concerns of nation states. This general view is backed up by a more specific claim: that only international tribunals can hold political leaders to account.

Nuremberg is thus often mentioned in formal legal documents to legitimise the workings of the Hague Tribunal, which is often presented as Nuremberg's successor.[1] References to the trials abounded from the very moment the Tribunal was even conceived. When US Secretary of State Lawrence Eagleburger first suggested putting leading Serb officials on trial, he said that he had been moved to do so during a meeting with Elie Wiesel, the famous Holocaust survivor and author.[2] The UN Resolution of

1. *Prosecutor* v. *Milošević*, Appeals Chamber hearing on joinder, 30 January 2002, transcript pp. 331–2.
2. Lawrence Eagleburger, Opening statement from a news conference, Geneva, en route to Brussels, 17 December 1992.

6 October 1992, which proposed the creation of a committee of experts to examine war crimes in Yugoslavia, deliberately chose the word 'commission' in order to recall the United Nations War Crimes Commission, which had preceded the Nuremberg trials.[3] When the UN Security Council adopted Resolution 808 on 22 February 1993, creating the Yugoslav Tribunal, the US Ambassador to the UN, Madeleine Albright, declared that 'the Nuremberg principles have been reaffirmed.'

However, these references to Nuremberg are false and misleading. First, it is not true that the Nuremberg trials forced state leaders to account for their acts for the first time. Heads of state and political leaders have been put on trial at various times in history – Charles I and Louis XVI are cases in point. In the twentieth century, the Vichy government in France put the leaders of the Third Republic on trial for having allegedly led France into war unprepared, while Marshal Pétain was then tried after the Liberation. In 1989, the Romanian dictator, Nicolae Ceauşescu, was put on trial for genocide by the revolutionary authorities who had overthrown him and, a guilty verdict having been pronounced, was taken out of the room and shot.

Second, it is not true that Nuremberg established for the first time the principle that the law is higher than the orders issued by a head of state or a military commander. On the contrary, it is one of the oldest principles of political philosophy that the state is itself subject to natural law, while most military codes in the world (including that of Nazi Germany) forbid soldiers from executing illegal orders. Nor did Nuremberg invent the laws of war: these very ancient and most civilised states have for centuries had laws on their statute books governing what their soldiers may do in battle and making commanders responsible for their subordinates' acts.

3. The author of the text was Michael Scharf (see his *Balkan Justice. The Story Behind the First International War Crimes Tribunal since Nuremberg*, Carolina Academic Press, Durham, NC, 1997, p. 40). Scharf's other works also abound with references to Nuremberg.

These, the traditional laws of war, were promulgated because, in wartime, the soldiers of one country typically find themselves on the territory of another state but under the command of their own nationals. The jurisdiction of the occupied state is therefore, by definition, not in force. The laws of war were developed to prevent soldiers from taking advantage of this jurisdictional vacuum. When one hears it claimed today that the International Criminal Tribunal for the former Yugoslavia has established for the first time that attacks on villages are illegal, and that superior officers are personally responsible for preventing abuses by soldiers under their command, one realises that one inhabits a world without memory.

Instead, where Nuremberg was innovatory was in its prosecution and conviction of individuals under the criminal law for planning and executing a war of aggression. All twenty defendants at the original Nuremberg trials were prosecuted for complicity in this. Never before had a state's decision to go to war been subject to a judicial process in this way, and never before had state leaders been held personally criminally responsible for such acts. Although the Treaty of Versailles had blamed Germany for having started the First World War, the German imperial leaders were never tried: Kaiser Wilhelm II went to live in exile in the Netherlands, which refused to extradite him for trial. Instead, Germany as a state was subject to reparations.

Because the International Military Tribunal (IMT) at Nuremberg was a court and not a legislature, it had to claim that these were not really innovations at all. This was to answer the charge that the Tribunal was administering justice retroactively, thereby infringing *nullum crimen sine lege*, (no crime without a law) a charge which was certainly levelled at Nuremberg at the time, and plausibly so.[4] The IMT did this

4. Carl Schmitt, *Das international-rechtliche Verbrechen des Angriffskrieges und der Grundsatz 'Nullum crimen, nulla poena sine lege'*, Duncker & Humblot, Berlin, 1945.

by claiming that certain treaties, like the Kellogg-Briand Pact of 1928, as well as customary international law, made the use of aggressive war as an instrument of state policy illegal.

Whatever view one takes on this important question, it cannot be doubted that 'crimes against peace' were at the very core of the logic of the Nuremberg trials. When Chief Justice Robert Jackson rose to his feet to open the prosecution, he said, 'The privilege of opening *the first trial in history for crimes against the peace of the world* imposes a grave responsibility.'[5] He did not say it was the first trial for crimes against humanity. He spoke as he did because he had been convinced since June 1945 that 'the crime which comprehends all lesser crimes is the crime of making unjustifiable war.'[6] The judges agreed. In their sentence delivered on 30 September 1946, they said:

> War is essentially an evil thing. Its consequences are not confined to the belligerent states alone, but affect the whole world. To initiate a war of aggression, therefore, is not only an international crime, it is the supreme international crime, *differing only from other war crimes in that it contains within itself the accumulated evil of the whole*.[7]

It was indeed the fundamental philosophy of the Nuremberg trials that the worst crime the leaders of one state can commit against another state is to violate its national sovereignty by attacking it. This broadly pacifist sentiment made its way almost immediately into the Charter of the United Nations. Indeed, on 11 December 1946, within just a few months of the end of the Nuremberg trials, the General Assembly of the United Nations voted to adopt the 'Nuremberg Principles' as part of their effort to elaborate an 'international Criminal Code of Offences against the peace of the world'.

The reason for this is not difficult to discern. The world had been plunged into an all-engulfing planetary conflict, which

5. Telford Taylor, *The Anatomy of the Nuremberg Trials*, Little Brown, New York, 1992, p. 167, emphasis added.
6. Taylor, *Anatomy of the Nuremberg Trials*, p. 54
7. Quoted in Ibid., p. 575, emphasis added.

had lasted for six years and had consumed tens of millions of lives. The governments-in-exile who called themselves 'the United Nations' before the formal creation of that organisation regarded the principal crime of the Nazis as being that of having started the world war. By the time they issued the St James Declaration of 12 June 1941, the industrialised mass murder, which we now know as the Holocaust, was not yet fully under way. By definition, therefore, the focus could not be on the future massive human rights violations of the Nazi regime. The Declaration said instead that the governments in exile were committed to 'the struggle against German and Italian oppression', that 'there can be no settled peace and prosperity so long as free peoples are coerced by violence', and that 'the only true basis of enduring peace is the willing cooperation of free peoples in a world … relieved of the menace of aggression.'

Knowledge of the specific crime of genocide committed in what we now call the Holocaust was only beginning to seep out when the trials eventually started after the war's end. Richard Dimbleby did not broadcast from Belsen until April 1945, Auschwitz having been liberated by the Red Army in February 1945. The prosecutor at Nuremberg, Telford Taylor, had not even heard of the death camps in Poland by the spring of 1945.[8] Instead, the first and central charge against the Nazis was that they had planned and executed a war of aggression.

This charge was first in the sense that it was enunciated at the beginning of Article 6, which listed the three counts ('Crimes against peace'); it was also first because the entire jurisprudence of Nuremberg stood on it. Not even Nuremberg's most lucid critics denied that crimes against humanity were abhorrent and merited punishment.[9] But it was only by presenting crimes against humanity as part of the overall crime of planning and

8. Ibid., p. xi.
9. Carl Schmitt, *Das international-rechtliche Verbrechen des Angriffskrieges und der Grundsatz 'Nullum crimen, nulla poena sine lege'*, Duncker & Humblot, Berlin, 1945, pp. 22 and 23.

executing aggressive war that Nuremberg was able to adjudicate them at all. The judges ruled: 'Insofar as inhumane acts charged in the indictment, and committed after the beginning of the war, did not constitute war crimes, they were all committed in execution of, or in connection with, the aggressive war, and therefore constituted crimes against humanity.'[10]

In other words, the International Military Tribunal, created to adjudicate the law of war, was able to punish crimes which were not specifically war crimes (in this case, the Holocaust) only by presenting them as an integral part of the fundamental war crime of preparing and executing a war of aggression. The charge of 'crime against peace' was thus the Archimedean point on which the entire jurisprudential edifice of the Nuremberg trials was levered into place.

The centrality of the charge of crimes against peace was also underlined when the IMT refused to prosecute any of the defendants for acts committed before 1 September 1939, the date when Germany launched the war by invading Poland. This fact alone emphasises that the Nuremberg trials were specifically for war crimes. The Prosecution had contended that Nazi atrocities in Germany (especially those committed against Jews) prior to the war in Poland would be punishable under the Charter's definition of crimes against humanity in Article 6 (c). Telford Taylor explains the judges' reasoning:

> The Tribunal, however, read Article 6 very strictly so that the atrocities listed in 6(c) [crimes against humanity] were punishable only if perpetrated 'in connection with any crime within the jurisdiction of the Tribunal'. That meant, of course, clauses 6(a) [crimes against peace] and 6(b) [war crimes], but the latter's coverage began on 1st September 1939. Prior to that date, crimes against humanity 'were punishable only' in connection with crimes against peace in clause 6(a). In the Tribunal's opinion, the pre-war Nazi atrocities 'had not been satisfactorily proven that they were done in execution of, or in connection with' the provisions of Article 6(a) [crimes against peace] and therefore: 'The Tribunal

10. Trial of the Major War Criminals, Volume 1, pp. 254–5.

> cannot make a general declaration that the acts committed before 1939 were Crimes Against Humanity within the meaning of the Charter.'
>
> The Tribunal's interpretation of Article 6 was legally accurate, and thus, as a practical matter, *the Tribunal was deemed to have no jurisdiction over the Nazi atrocities in Germany prior to the war against Poland*.[11]

Thus we can see that the IMT did not apply supranational, morality-based law, which would have permitted indictments for acts committed before the war started, but that instead it operated on carefully construed jurisdictional principles, the foundation stone of which was the supreme crime of waging aggressive war. This principle was later elevated, by the Charter of the United Nations, into the central fact about the international system, which made explicit one of the oldest principles of customary international law, namely, that states are sovereign and that they should not attack their neighbours.

The Nuremberg judges' preoccupation with sovereignty also meant that they were very careful to explain the sources of their judicial legitimacy. They strongly rejected the idea that morality alone justified their authority. Instead, they argued that their right to judge the Nazis flowed only from the particular constitutional situation which arose out of the unconditional surrender obtained from the Germans by the Allies in 1945. Unconditional surrender meant that there was literally no German government in Germany. The judges emphasised again and again that the Allies wielded sovereign power in Germany in 1945, and indeed when the Charter of the International Military Tribunal was published, the judges said that the promulgation was itself 'the exercise of the *sovereign legislative power* by the countries to which the German Reich unconditionally surrendered'.[12]

11. Taylor, *Anatomy of the Nuremberg Trials*, p. 583, emphasis added.
12. Judgement, Official documents of the Tribunal, Vol. 1, p. 171, quoted in Jeremy Rabkin, 'Nuremberg Misremembered', *SAIS Review*, Summer–Fall 1999, p. 87 and note 13, emphasis added.

Consequently, the Nuremberg trials were not conducted in the name of the 'international community' but instead only in the name of the four Allied powers. Initially, it had been proposed that the Nuremberg prosecutions be brought by 'the peoples of the United Nations'.[13] If such a formulation had been accepted, it would indeed have implied that the 'international community' had become the new sovereign, since the power to prosecute criminals is one of the key attributes (if not the definitive attribute) of state sovereignty. It would have lent credence to the idea, which inspires the philosophy of today's international tribunals, that 'crimes against humanity' should be adjudicated by the representatives of 'humanity', that is, by the international community.

Instead, the Allies formulated the prosecutions at Nuremberg thus: 'The United States of America, the French Republic, the United Kingdom of Great Britain and Northern Ireland, the Union of Soviet Socialist Republics, v. Mr. Hermann Goering … ' etc. No other states were invited to participate in the preparation or the execution of the work of the tribunal, and the suggestion made by German defence lawyers that at least some of the judges should come from neutral states was also dismissed.

It is quite probable that there were ulterior motives in the Allies' approach. Most legal scholars accept that the Nuremberg trials were far from perfect. The most obvious shortcoming was the fact that the Nazis were charged with planning and executing a war of aggression, whereas one of the Allied powers, the Soviet Union, which had been Nazi Germany's ally from 1939 to 1941, had collaborated with the Germans in the plans to wage aggressive war. The USSR helped itself to chunks of eastern Poland, the Baltic states

13. I am greatly indebted to Jeremy Rabkin, 'Nuremberg Misremembered', see especially p. 87 and note 14. He refers to 'Memo to Justice Jackson and General Donovan, July 3, 1945' from 'S.G.', p. 3. This memo is in Volume CVIII of the collected Nuremberg papers of William Donovan in the Cornell Law Library.

and Bessarabia under the terms of the secret protocol of the Molotov-Ribbentrop Pact signed on 23 August 1939. The Nazis even provided their Bolshevik allies with huge quantities of fuel, food and war materiel for the purposes of conquering and occupying eastern Poland.

The prosecuting authorities at Nuremberg (the Allied powers) therefore wanted to prevent their own acts from coming under scrutiny during the trial. They wanted to make it impossible for the Nazis to make *tu quoque* defences (that is, that the accuser is as guilty as the accused), as indeed Hermann Goering did do during his cross-examination by Robert Jackson. The judges went to considerable lengths to minimise the possibility of such strategies by defendants. For example, the charges against the Germans for having launched air attacks on British cities were removed: Goering, head of the Luftwaffe, was not indicted for this because the British had not only started the air war by bombing cities in the Low Countries, but had finished it with the massive use of air power, killing about half a million German civilians through the aerial bombardment of scores of German cities. This was far more than the Germans had killed with their bombs.[14] In fact, the Charter of the Nuremberg tribunal was being proofread when the *Enola Gay* dropped the atomic bomb on Hiroshima on 6 August 1945.[15] It is greatly to the discredit of those moralists who today extol Nuremberg as an example of untarnished superior morality that they blithely assume that those trials were a model of due process.[16]

However, there were also very sound jurisdictional reasons why the Allies insisted that they alone should run the trials. The judges understood that their authority to try the Nazi leaders flowed only from the fact that they in fact held jurisdictional authority over Germany, for the time being. They were

14. Jörg Friedrich, *Der Brand, Deutschland im Bombenkrieg 1940–1945*, Propyläen Verlag, München, 2002.
15. Taylor, *Anatomy of the Nuremberg Trials*, p. 74.
16. See the excellent article by István Deák, 'Misjudgement at Nuremberg', *New York Review of Books*, 7 October 1993.

therefore at pains to explain why they had the *legal* authority to judge acts whose *immorality* no one disputed. In 1947, as the Americans carried out further trials in Nuremberg using the Charter and jurisprudence of the original trial of the twenty leading Nazis, the judges returned to this theme of sovereignty and emphasised that

> By virtue of the situation at the time of unconditional surrender, the Allied Powers were provisionally in exercise of supreme authority, valid and effective until such time as, by treaty or otherwise, Germany shall be permitted to exercise the full powers of sovereignty … We sit as a Tribunal drawing its sole power and jurisdiction from the will and command of the four occupying powers.[17]

Unlike our modern moralists, therefore, the Nuremberg judges were well aware that an appeal to morality alone, or to vague notions about crimes shocking the conscience of civilised nations, was not sufficient to show that they had judicial authority over Germany. To be sure, the judges did argue that international law had a universal quality, but only in the sense that all states should respect and apply it. They did not argue that supranational tribunals had the right to push state authorities aside. In fact, they specifically ruled that to do so would be illegal:

> This universality and superiority of international law does not necessarily imply universality of its enforcement. As to the punishment of persons guilty of violating the laws and customs of war … it has always been recognised that tribunals may be established and punishment imposed by the state into whose hands the perpetrators fall … However, enforcement of international law has been traditionally subject to practical limitations. *Within the territorial boundaries of a state having a recognized, functioning government presently in the exercise of sovereign power throughout its territory, a violator of the rules of international law could be punished only by the authority of officials of that state. The law is*

17. Trials of War Criminals before the Nuremberg Military Tribunal under Control Council Law No. 10, Volume III, 'The Justice Case,' Washington DC, 1951, pp. 963–4.

> *universal, but such a state reserves unto itself the exclusive power within its boundaries to apply or withhold sanctions.* Thus, notwithstanding the paramount authority of substantive rules of common international law, the doctrines of national sovereignty have been preserved through the control of enforcement machinery … Only by giving consideration to the extraordinary and temporary situation in Germany can the procedure here be harmonized with established principles of national sovereignty. In Germany an international body (the Control Council) has assumed and exercised the power to establish judicial machinery for the punishment of those who have violated the rules of the common international law, *a power which no international authority without consent could assume or exercise within a state having a national government presently in the exercise of sovereign powers.*[18]

This last sentence is totally incompatible with the modern theory of international judicial intervention, which insists precisely that states with functioning governments can and should be constrained. The ruling is therefore quite incompatible with the existence of ad hoc tribunals like the ICTY. Consequently, we can say that the creation of the ICTY represented a radical departure from the existing law, as confirmed by Nuremberg: it did not represent a continuation of it. Far from being the successor to Nuremberg, The Hague has introduced a new interventionist doctrine in international law, which the Nuremberg judges had explicitly and deliberately rejected.

The contrast between Nuremberg and the ICTY is therefore clear. Whereas the Nuremberg judges said that their legitimacy derived from the fact that they were acting on the instructions of the sovereign power in Germany, the ICTY judges say that morality alone, or other vague and emotional notions, justifies their jurisdiction. In their first ruling on jurisdiction, the judges of the ICTY Trial Chamber said that national sovereignty had to give way automatically when the crimes alleged were grievous: 'The Trial Chamber agrees that in such circumstances, the sovereign rights of States cannot and

18. Ibid., pp. 969–70, emphases added.

should not take precedence over the right of the international community to act appropriately as they [the crimes alleged] affect the whole of mankind and shock the conscience of all nations of the world.'[19]

The Charter of the ICTY does not even mention 'crimes against peace' and the ICTY has said on several occasions that it has no competence to adjudicate them. This is in spite of the fact that, when the ICTY was created, assurances were given that it would apply existing international law and not make new law. The UN Secretary-General's report of 3 May 1993, which laid out the structure and philosophy of the ICTY and formed the basis on which the Security Council voted to bring it into being, said specifically that the ICTY 'would have the task of applying *existing* international humanitarian law',[20] of which the Nuremberg Principles unquestionably form an integral part. In fact, Nuremberg is explicitly listed as having 'beyond doubt become part of international customary law' by paragraph 35 of that report.

It is equally clear that war is legal under the UN system only in self-defence or if authorised by the United Nations Security Council. There therefore seems no reasonable excuse for the ICTY to say that it has no jurisdiction over aggression, as it did when it was asked to investigate NATO's attacks on Yugoslavia in 1999. On the contrary, the law is very clear on which wars are legal and which are not, and the ICTY or any other international tribunal (like the International Criminal Court) should have no difficulty whatever in adjudicating the matter.

Instead of applying existing international law, the ICTY has effectively overturned it. Its founding philosophy is much

19. *Prosecutor* v. *Duško Tadić*, Trial Chamber Decision on the Defence Motion on Jurisdiction, 10 August 1995, paragraph 42; this passage was quoted and reaffirmed by the Appeals Chamber in its own Decision in *Tadić* on the Defence Motion for Interlocutory Appeal on Jurisdiction on 2 October 1995, at paragraph 59.
20. 'International humanitarian law' is simply the modern term for 'the laws of war', emphasis added.

closer to the 'just war' concept, which, as Carl Schmitt shows, the world effectively abandoned in the seventeenth century.[21] Formulated by SS. Augustine and Aquinas, this theory held that a war could be just only under certain very limited conditions. Schmitt argued that the abandonment of the doctrine was a good thing, because it meant that international law regarded war as very difficult to justify morally. War was a regrettable but inevitable fact of international relations. He claimed that the best way to limit the horrors of war was to base the laws of war on the concept of the 'justified enemy', that is, on the refusal to regard him as a criminal. Schmitt said that this criminalisation of the enemy would in fact make wars ever more vicious because the enemy would henceforth not only have to be defeated in battle, but exterminated as a threat to humanity.[22] The accusation of 'crime against humanity', Schmitt argued, meant that the enemy was himself declared to be inhuman and therefore not worthy of respect or even lawful treatment. Schmitt, in other words, claimed that wars fought in the name of universal and limitless moral principles, rather than on the basis of the limited demands of reason of state, would themselves become limitless and even more terrifying and destructive than before.

The ICTY has also implicitly approved the doctrine of humanitarian intervention, at least to the extent that it refused to prosecute NATO for attacking Yugoslavia. Yet it was thanks to the Nuremberg trials that the post-war international system has been based on the interdiction of aggressive war as the supreme international crime. This reaffirmation of national sovereignty as the cornerstone of the international system, and as the best legal bulwark against war (there is no greater violation of national sovereignty than to attack and invade

21. Carl Schmitt, *Der Nomos der Erde*, Duncker & Humblot, Berlin, 1950.

22. Stephen Neff implies that there is indeed a return of the just war tradition. See 'Just wars reborn (1919–)' in *War and the Law of Nations, A General History*, Cambridge University Press, 2005, p. 277.

another state) stood in marked contrast to the political philosophy of the Nazis, who had treated the concept of state sovereignty with contempt, saying that it was but an artificial invention of bourgeois liberalism to obscure the biological unity of the European continent. One can say, therefore, that the commitment to non-interference in the internal affairs of states, reaffirmed as part of the Nuremberg Principles in the United Nations Charter, is an attempt to institutionalise an anti-fascist theory of international relations. It is this theory which the Allies destroyed by attacking Yugoslavia in 1999.

The United Nations' Charter, signed on 26 June 1945, was deeply inspired by the anti-war and pro-sovereignty sentiment, which was so strong in the aftermath of the Second World War. The very first words of the UN Charter commit the organisation 'to save succeeding generations from the scourge of war, which has twice in our lifetime brought untold sorrow to mankind'. For this reason, the UN Charter enjoins its members 'to refrain in their international relations from the threat or use of force against the territorial integrity or political independence of any state'. These words lifted the curtain on decades of de-colonisation and an apparent end to the rights of imperial powers.

This principle of non-interference was well grounded in customary international law. Its explicit origins are often located in the aftermath of the Thirty Years' War, when Europe's princes adopted the principle *cuius regio, eius religio* ('Whose rule, his religion') to put a stop to the bloodbath which ensued when one state decided it had the right to attack another for religious reasons. The principle of non-interference has been enunciated on many occasions since, when the International Court of Justice, the UN's highest legal body, has confirmed that there exists no right of interference or intervention in the internal affairs of other states, not even when human rights are alleged to be at stake. In 1986, the ICJ ruled on a case brought by Nicaragua against the United States for interfering

in its internal affairs by creating and supporting the Contras to overthrow the Sandanista government. The ICJ found that such action was illegal and that the American claim to be acting in the name of a higher good was not admissible as an argument in law:

> The Court reaffirmed that there does not exist a new rule opening up a right of intervention by one State against another on the ground that the latter has opted [to adhere] to some particular ideology or system; that alleged violations of human rights could not be taken as justification for the use of force, since the use of force could not be the appropriate method to monitor or ensure respect for human rights.[23]

The same sentiment is to be found in the Declaration on Friendly Relations adopted by the UN General Assembly in 1970, which stipulated:

> No State or group of States has the right to intervene, directly or indirectly, for any reason whatsoever, in the internal or external affairs of another State. Consequently, armed intervention and all other forms of interference or attempted threats against the personality of the State or against its political, economic and cultural elements, are in violation of international law.
>
> No State may use or encourage the use of economic, political or any other type of measures to coerce another State in order to obtain from it the subordination of the exercise of its sovereign rights and to secure from it advantages of any kind. Also, no State shall organise, assist, foment, finance, incite or tolerate subversive, terrorist or armed activities directed towards the violent overthrow of the regime of another State, or interfere in civil strife in another State.[24]

It was precisely because Nuremberg did outlaw aggressive war that a lone voice from the time of the Nuremberg trials itself

23. 'Military and Paramilitary Activities in and against Nicaragua, Nicaragua v. USA,' International Court of Justice, Judgment of the Court, 27 June 1986.
24. Declaration of Principles of International Law concerning Friendly Relations and Co-operation between States adopted by consensus on 24 October 1970, Resolution 2625 (XXV). See also the Declaration on the Inadmissibility of Intervention and Interference in the Internal Affairs of States, General Assembly Resolution, 9 December 1981.

was raised when NATO attacked Yugoslavia over Kosovo. Walter Rockler, the last surviving lawyer to have worked on the Nuremberg trials (he was a prosecutor), spoke energetically against the Kosovo war. In an article published during the bombing, Rockler made it clear that the attack on Yugoslavia was precisely the kind of thing for which the Nazis themselves had been indicted and convicted:

> We have engaged in a flagrant military aggression, ceaselessly attacking a small country primarily to demonstrate that we run the world. The rationale that we are simply enforcing international morality, even if it were true, would not excuse the military aggression and widespread killing that it entails. It also does not lessen the culpability of the authors of this aggression.
>
> As a primary source of international law, the judgment of the Nuremberg Tribunal in the 1945–1946 case of the major Nazi war criminals is plain and clear … At Nuremberg, the United States and Britain pressed the prosecution of Nazi leaders for planning and initiating aggressive war … .[25]

It is a poignant irony that the men who said they were honouring the Nuremberg Principles by attacking Yugoslavia and indicting its president were in fact undertaking actions that merited their own indictment under them.

During the Milošević trial, indeed, the fact that the ICTY judges were blithely ignorant of Nuremberg and the associated United Nations law was painfully obvious. At one point in the proceedings, during the testimony of former Supreme Commander of NATO Wesley Clark, Milošević addressed a question to the presiding judge, Sir Richard May, which was intended to show that NATO had acted illegally in the run-up to the war. 'Do you know, Mr. May,' Milošević asked, 'that threats are also prohibited under the UN Charter, threats issued to states?' Judge May simply replied, 'No. Let us move on.'[26]

25. 'War crimes law applies to U.S. too', by Walter Rockler, *Chicago Tribune*, 23 May 1999.
26. Trial transcript, 15 December 2003, p. 30463.

4
'A false tribunal'

SLOBODAN MILOŠEVIĆ MADE his first appearance in court on 3 July 2001. The proceedings, which were in fact a pure formality at that stage, created a worldwide sensation. His face had been on television screens for a decade, as the apparently central figure in the bloody and protracted collapse of Yugoslavia. He had been comprehensively demonised as the most evil man in the world since Hitler. Now he sat in the antiseptic surroundings of the court room at the ICTY in The Hague, and he was clearly furious. Speaking in English, he denounced the Tribunal and his indictment by it: 'I consider this Tribunal a false Tribunal and the indictment a false indictment. It is illegal being not appointed by the UN General Assembly, so I have no need to appoint counsel to illegal organ … This trial's aim is to produce false justification for the war crimes of NATO committed in Yugoslavia.'[1]

Judge May called this first session to an end while Milošević was still in mid-sentence, and the hearing ended after only eleven minutes. On this and another occasion, Judge May switched off Milošević's microphone as he was speaking, and he was to behave rudely towards Milošević throughout the trial until the judge's death in 2004.

It had taken more than two years after the end of the Kosovo war for this trial to begin. A 'huge CIA operation' had been mounted in Kosovo to overthrow Milošević in 1999 but it had

1. Trial transcript, 3 July 2001, p. 2.

failed.[2] Milošević remained in power until October 2000 when, thanks to another $100 million poured into the coffers of opposition politicians by the Americans on the occasion of the presidential elections, and thanks to the fact that the pro-US Serb politicians concluded alliances with some of the country's most notorious gangsters, a *putsch* overthrew Milošević on 5 October 2000.[3]

In due course, Milošević was imprisoned in Belgrade on corruption charges. (Subsequent to his transfer to The Hague, these charges vanished from public view and none of the stories about him siphoning off a personal fortune of millions into secret bank accounts in Switzerland or Cyprus were ever confirmed.) The ICTY continued to demand Milošević's transfer to The Hague, and the US government made financial aid to Yugoslavia conditional on it. (Much of the promised aid never materialised, even after Milošević was handed over to The Hague.) The new Yugoslav authorities sought a legal route to the transfer, the difficulty being that Yugoslavia did not recognise the ICTY and its constitution forbade extradition. The federal government under Yugoslav President Vojislav Koštunica tried to pass a law on extradition but failed to obtain the necessary parliamentary majority, the Milošević's Socialist Party of Serbia having won the largest number of seats in the federal parliamentary elections, which were held at the same time as the presidential poll that Milošević himself had lost in September 2000. The government of Serbia under Prime Minister Zoran Djindjić then tried to pass similar provisions by

2. The quote is from Tim Marshall, *Shadowplay*, Samizdat B92 Belgrade, 2003, p. 49. See also p. 36.
3. See my paper, 'The Technique of the Coup d'État' on <www.sandersresearch.com>; for the role of gangsters see 'Anatomie einer Revolution, Zoran Djindjić im Gespräch mit Paul Lendvai', *Europäische Rundschau*, 2001/4, pp. 3–20. and 'October 5: a 24-hour coup' by Dragan Bujoševi and Ivan Radovanović, Media Center, Belgrade, 2000. For the US role see 'U.S. Advice Guided Milošević Opposition; Political Consultants Helped Yugoslav Opposition Topple Authoritarian Leader', by Michael Dobbs, *Washington Post*, 11 December 2000.

decree, but the Yugoslav Federal Constitutional Court issued an injunction against the decree, saying it wanted to review it first. No sooner had this ruling been handed down than police, acting on the orders of the government of Serbia, bundled the former president into a helicopter and took him, via a US air base in Bosnia, to The Hague. His supporters referred to this as a kidnapping. The date was highly symbolic: he was taken from Belgrade to The Hague on 28 June 2001, St Vitus' Day, the anniversary of the Battle of Kosovo Field in 1389 and Serbia's national day. When it did eventually rule on the matter, the Federal Constitutional Court found that Milošević's transfer to The Hague had indeed been illegal.[4]

The international 'human rights community' naturally welcomed Milošević's transfer. Its leading protagonists were excited that their new world order had finally come to fruition with the appearance of a head of state in court. Human Rights Watch published a press release entitled, 'Milošević Arrest Breaks Ground on International Justice' (28 June 2001). But then someone realised that the ICTY was supposed to apply the existing rules of international justice, and not to invent new ones. A new press release was produced, entitled 'Transfer of Milošević Founded in International Law' (2 July 2001), which tried to square the circle by proclaiming that the transfer of Milošević was 'a historic precedent with a sound basis in international law'.[5]

In fact, not only was the transfer of dubious legality, the ICTY itself was as well. The thrust of Milošević's remarks on his first day in court was that the ICTY was created by a simple executive decision – a resolution of the United Nations Security Council, voted under the direct influence of the US government.

The process had begun on 16 December 1992, when the US Secretary of State Lawrence Eagleburger (who had

4. Official Gazette of the Federal Republic of Yugoslavia, No. 70/01, 28 December 2001.
5. <www.hrw.org>.

taken office only the previous week, on 8 December 1992) made a now-famous speech in which he named various Serb officials, including Slobodan Milošević, as people who ought to be indicted for war crimes. This speech helped scupper the attempts then being made by Cyrus Vance and David Owen to reach a political settlement to the Bosnian civil war.[6] The idea of an international tribunal suited the American fetishism for litigation: as is well known, huge swathes of American life are subjected to the say-so of lawyers and courts, and US officials evidently thought that their domestic practices ought to be extended to international affairs the world over.

The US government had then thrown its weight behind the project of creating an international tribunal to try the named Serbs and others. By February, a resolution had been voted in the Security Council, which declared that such a tribunal would be set up.[7] A report on how such a tribunal could be created was produced on 3 May 1993. On the basis of it the ICTY was formally brought into being by United Nations Security Council Resolution 827, dated 25 May 1993.

The fact that the ICTY was brought into being in this manner should be a matter of the gravest concern to anyone interested in the rule of law. The Security Council is a body composed of governments. It is an executive, not a legislative or judicial, body. Its powers are outlined in the UN Charter and many of the most important ones are in Chapter 7: it was on the basis of its Chapter 7 executive powers to take action to keep the peace that the Security Council decided to create the ICTY.

The correct procedure for creating an international criminal tribunal would have been to submit a treaty for signature and ratification by the states of the former Yugoslavia. States are the subjects of international law and international law grows

6. Michael Scharf, *Balkan Justice. The Story Behind the First International War Crimes Tribunal since Nuremberg*, Carolina Academic Press, Durham, NC, 1997, p. 44.
7. United Nations Security Council Resolution 808, 22 February 1993.

out of the agreements between them. This is the method which was adopted for the creation of the International Criminal Court when its treaty was signed in July 1998. In his report of 3 May 1993, the Secretary-General specifically admitted that this would be the normal procedure. But he decided to reject it: 'The treaty approach incurs the disadvantage of requiring considerable time to establish an instrument and then to achieve the required number of ratifications for entry into force. Even then, there could be no guarantee that ratifications will be received from those States which should be parties to the treaty if it is to be truly effective.'[8]

In other words, legality was sacrificed to expediency. The UN knew that the states over whom the tribunal would have jurisdiction (especially the Federal Republic of Yugoslavia itself) would not consent to it. It was forced upon them. The sovereign rights of the ex-Yugoslav states were thus infringed in precisely the way the Nuremberg judges had said was inadmissible: never before had sovereign states in full possession of their powers been stripped of their rights and obligations in this way. The anomaly was especially odd since the secessionist states (Slovenia, Croatia, Bosnia & Herzegovina, Macedonia) had only just been recognised as sovereign and admitted as full members of the United Nations.

In fact, the Yugoslav states were not the only states affected by the creation of the ICTY. The right and duty to prosecute criminals, including war criminals, is not only inherent in the concept of national sovereignty, it is also an integral part of international law itself. The 1948 Genocide Convention, which has been duly signed and ratified by a very large number of states, requires *national* authorities to prosecute people suspected of genocide, yet this provision was summarily deleted by an executive fiat when the ICTY was set up, at least for acts

8. Report of the Secretary-General Pursuant to Paragraph 2 of Security Council Resolution 808 (1993), Presented 3 May 1993 (S/25704), paragraph 19.

of genocide committed in the former Yugoslavia. The creation of the ICTY therefore unilaterally rewrote an important treaty of international law, one moreover which had been drawn up in the immediate aftermath of Nuremberg and the Second World War.

The manner of the ICTY's creation therefore implied that executive bodies like the UN Security Council (composed of governments) have the right to strike down laws and treaties. This is antithetical to the very principle of the rule of law itself, which requires that governments be constrained by the law not be the authors or arbiters of it. A subsidiary organ of the UN Security Council, the ICTY is not a tribunal established by law or overseen by a legislature or assembly, but instead is an organ created by executive fiat in pursuit of political goals, in this case peace.

The fact that the ICTY was not created by law infringes a core principle of the rule of law. Article 14 of the 1966 United Nations Covenant on Civil and Political Rights, and Article 6 of the European Convention on Human Rights both say that it is a core right for defendants to be tried by a tribunal 'established by law'. The purpose of this provision is precisely to prevent the lawlessness inherent in the very notion of an ad hoc tribunal like the one created for Yugoslavia. Such tribunals infringe the definition of 'the rule of law' formulated by the great British constitutionalist, A.V. Dicey: 'We mean [by the rule of law], in the first place, that no man is punishable or can be made to suffer in body or goods except for a distinct breach of *law established in the ordinary legal manner before the ordinary courts of the land*.'[9]

As if these various infractions against core legal principles were not enough, the circumstances in which the ICTY was created led to further perversions of the legal process.

9. A.V. Dicey, *Introduction to the Study of the Law of the Constitution*, Chapter IV, 'The Rule of Law', see Liberty Classics, Indianapolis, IN, 1982, p. 110, emphasis added.

At the Security Council meeting on 25 May 1993 at which Resolution 827 was approved, the ambassadors of various powerful states made apparently impromptu interventions after the vote. These statements were comments on the Statute on which the Security Council had just voted. Although they were merely declarations by government ministers about what they thought the law should be, they have made their way into the canon of the ICTY's jurisprudence[10] and have thus become law themselves.

The statements proposed a number of radical changes to jurisdictional matters associated with the application of the laws of war, all of which reinforce the supranational ideology referred to in Chapter 2. One of the key provisos in the Secretary-General's report was that the new Tribunal would not have the power to make new international law, but instead would merely apply existing law.[11] Anything else would violate the key legal principle *nullum crimen sine lege* (no crime without a law).[12] However, the US Ambassador to the UN, Madeleine Albright (later secretary of state during the Kosovo war, a conflict which many in Washington believe that she initiated) outlined various 'clarifications' to the text that had just been approved: 'The "laws or customs of war" referred to in Article 3 [of the ICTY statute] include all obligations under humanitarian law agreements in force in the territory of the former Yugoslavia, including common article 3 of the 1949 Geneva conventions and the 1977 Additional Protocols to those conventions.'[13]

In fact, the Statute said no such thing. On the contrary, the Secretary-General's report had said specifically that customary

10. See for instance the Erdemović sentencing judgment of 29 November 1996, paragraph 58.
11. Report of the Secretary-General, 3 May 1993, paragraph 29, UN Document S/25704.
12. Report of the Secretary-General, 3 May 1993, paragraph 34.
13. Madeleine Albright, provisional verbatim report of the 3, 217th meeting held at Headquarters, New York, on Tuesday 25 May 1993 at 9 p.m., UN Document S/PV.3217.

international humanitarian law (IHL) was composed only of the Geneva Conventions of 12 August 1949, the Hague Convention of 1907, the Genocide Convention of 1948 and the Nuremberg Charter of 8 August 1945. It specifically excluded the 1977 Additional Protocols to the Geneva Conventions. The first of these additional protocols makes important amendments to the kinds of conflict covered by international humanitarian law. IHL applies only in conditions of 'armed conflict' and generally only in international armed conflicts. The first Additional Protocol of 1977, however, deals with conflicts which are internal in character, that is, civil wars.

The US government wanted to include internal wars in the ICTY's jurisdiction because the Bosnian war was obviously a civil war (although great effort was made to declare it to have been an international conflict, and successfully so). However, the US itself has never ratified this Additional Protocol, which is one of the reasons why it is not considered indubitably part of customary international law. So Madeleine Albright's intervention had the effect of extending the field of customary international law – by simple declaration.

Madeleine Albright also used the occasion to press for a maximalist doctrine of command responsibility. This was to be of the first importance for the ICTY's jurisdiction, which has expanded the doctrines of command responsibility and joint criminal enterprise far beyond even the widest and most controversial precedents. She said that commanders should be held responsible for the acts of their subordinates if it was found that they had failed to take reasonable steps to prevent or punish crimes committed by them. In other words, a commander could be held criminally responsible for acts that he had not ordered and of which he had been unaware. She did this despite knowing that the Pentagon was itself hostile to such an interpretation of command responsibility, and that it is highly contentious in international law.

The French, British, American and Hungarian ambassadors also made similar declarations. The wording suggests that they had agreed in advance what they would say. No wonder that the Venezuelan, Brazilian and Chinese delegates protested at this ambush, the Venezuelan ambassador saying that the declarations had been 'rammed down our throats'.[14]

In spite of the fact that the other members had no opportunity to vote on these statements, they quickly made their way into the law of the ICTY. When it decided to rule on its own legality and competence (which was itself an infraction of the key legal principle that no one may be judge in his own cause) the ICTY used those statements to enlarge its own power by creatively reinterpreting its Statute in the way the statements demanded. (A 'teleological interpretation' was the polite euphemism it used for this judicial activism.[15]) It did this in the Appeal Chamber's Decision on the Defence Motion for Interlocutory Appeal on Jurisdiction in the ICTY's first trial, that of Duško Tadić. Tadić was a café-owner and low-level perpetrator in the Bosnian civil war who, because he came unexpectedly into the ICTY's hands 'at a time when it suffered both from a lack of individuals to try and from a surfeit of judges with no cases to adjudicate',[16] became a legal guinea-pig because the rulings in his trial laid down many of the fundamental issues on which the ICTY was to operate. In this ruling in his trial, the statements made by the ambassadors are quoted as authoritative sources of law, even though they are *ad hoc* statements made out of order by representatives of governments.[17] Henceforth, the 1977

14. Scharf, *Balkan Justice*, p. 62.
15. *Prosecutor* v. *Duško Tadić*, Decision on the Defence Motion for Interlocutory Appeal on Jurisdiction, 2 October 1995, paragraphs 72ff.
16. Allison Marston Danner and Jenny S. Martinez, 'Guilty Associations: Joint Criminal Enterprise, Command Responsibility and the Development of International Criminal Law', *California Law Review*, Vol. 93, 2005, p. 104.
17. *Prosecutor* v. *Duško Tadić*, 2 October 1995, paragraph 88.

protocol, and the principle that the laws of war apply generally to armed conflicts whether they are international or internal, forms part of the ICTY's jurisprudence and will presumably be used to extend that of other supranational jurisdictions (for example, the ICC's) as well. There can be few clearer cases of abusive 'law-making' by governments, and fewer clearer cases of the subordination of the judicial process to the demands of politics.

The lawlessness of the ICTY was therefore clear at the very moment of its conception. The stated justification for its creation was in fact a political purpose, the promotion of peace; the true political purpose of it was to criminalize the Serb leaders, for they were the only ones mentioned in Eagleburger's original speech, while the Bosnian and Croatian ambassadors to the United Nations were invited to attend the Security Council meeting which created the ICTY. This fact suggests that they never expected their leaders or soldiers to be indicted by it, as they soon were.

These political goals have been reaffirmed by several authors who support the development of international criminal justice (ICJ).[18] Some say that ICJ furthers the 'peace process' by removing certain political leaders from peace negotiations by issuing indictments against them. This is what happened at the Dayton Conference, which ended the Bosnian civil war, a conference that the indicted Bosnian Serb leaders did not attend. It should be obvious that the judicial process is corrupted if prosecutions are used to serve the short-term political goal of removing this or that leader. Yet there is no doubt that this is what happens. Speaking in 2006, David Scheffer, Bill Clinton's Ambassador for War Crimes, discussed how the US

18. Paul Williams and Michael Scharf in *Peace with justice?, War Crimes and Accountability in the former Yugoslavia*, Rowman & Littlefield, MD and Oxford, 2002.

State Department was in regular contact with Milošević: 'As a subtext to our diplomatic engagement with Milošević was the possible indictment of him.'[19] The political usefulness of a potential indictment was emphasised by Scheffer's own work liaising between the US intelligence services and the Office of the Prosecutor to provide material for the indictment of Milošević, which instantly scuppered any chance of a negotiated end to the conflict in Kosovo.

This fatal predominance of political considerations in the ICTY's very *raison d'être* has only been exacerbated by the broader imperatives of supranationalism, which are to bring the behaviour of all states under judicial control in the name of universal human rights. One leading ideologue of international criminal law is the British lawyer Geoffrey Robertson (who was sacked as President of the Special Court in Sierra Leone because he had been about to sit as a judge in a trial of men whom he had already proclaimed to be guilty in a book he had published); he writes eloquently about the true constitutional significance of international criminal law: 'The movement for global justice has been a struggle against sovereignty.'[20] Elsewhere, Robertson writes, 'What sets a crime against humanity apart … is the simple fact that it is a crime … *ordained by a government*.'[21] The assumption is that international organisations are better equipped to administer justice and realise human rights than states themselves, while it is often implied that states are inherently criminal. Supporters of the ICTY and international criminal justice, indeed, seem to have a strong hostility to the state as such. They say repeatedly that abuses of power committed by tyrants should be subject to criminal procedure and react impatiently to arguments about

19. Scheffer was speaking at the International Conference on the Trial of Slobodan Milošević, National University of Ireland in Galway on 29–30 April 2006.
20. Geoffrey Robertson, *Crimes against humanity: the Struggle for global justice*, Penguin, London, 2000, p. xviii.
21. Ibid., p. 241, emphasis added, also p. 338.

the strict legality of existing procedures, saying that these are but details in the face of the overriding need to prosecute people accused of mass murder.

This goal of creating a supranational vertical legal structure is in fact only tangentially related to the laws of war. The laws of war govern the behaviour of soldiers in battle. These laws, *ius in bello*, have existed in various forms for many centuries. The Geneva Conventions of 1949 have gained widespread acceptance and have been duly signed and legally ratified by most states. The laws of war differ from the laws of peace in several crucial respects. First, they govern the actions of only one class of the citizenry acting in a specific set of circumstances: soldiers engaged in battle. Second, they apply to that class of citizens even if they are physically outside the jurisdiction of their own state. Indeed, the laws of war were conceived precisely to take account of the fact that soldiers often fight on the territory of other states. Third, although the laws of war were initially promulgated by states to govern the acts of their own soldiers (and were enforced by their own courts martial) they concern exclusively acts committed in the name of the state. To bring acts of war under judicial control is therefore to subject acts of state to criminal justice. As Stephen Neff rightly observes, 'Perhaps the single most obvious and widely agreed feature of war, throughout its long history, has been its character as a public and collective enterprise … .'[22] The public nature of a war crime increases the further up the chain of command one goes.

It was these two last elements – extraterritoriality and supranationalism – which attracted human rights activists to the laws of war. People committed to universal human rights, to the end of state sovereignty, or to the creation of a single legal-political system for the whole planet, used the laws of war as a basis on which to build the foundations of their broader

22. Stephen Neff, *War and the Law of Nations, A General History*, Cambridge University Press, 2005, p. 13.

project. Such universalists used the fact that acts committed in wartime can be particularly shocking to deploy the emotive argument that there must be universal jurisdiction to deal with them.[23] Conflict is increasingly seen 'not (as formerly) in terms of a collision between rival national interests, but rather as human tragedy … This humanitarian approach marked the abandonment of the ethos of the duellist in favour of the more tender outlook of the physician.'[24] In its first ruling, indeed, the ICTY emphasised that 'a state-sovereignty-oriented approach has been gradually supplanted by a human-being-oriented approach.'[25]

The view that political power is itself potentially criminal is widely expressed by supporters of international criminal law. Paul Williams and Michael Scharf open their book *Peace with Justice*?, a polemic which argues that 'justice' is essential for peace-making, with a lapidary affirmation that the turmoil of the break-up of Yugoslavia was directly caused by 'Slobodan Milošević's reliance on ethno-nationalism and ethnic cleansing *as tools for accumulating and retaining political power* in order to pursue his dream of a greater Serbia'.[26] The same anti-state attitude made its way directly into the accusations against Milošević: when she rose to speak at the beginning of his trial, Chief Prosecutor Carla del Ponte said:

> Everything, Your Honours, everything with the accused Milošević was an instrument in the service of his quest for power. One must not seek ideals underlying the acts of the accused. Beyond the nationalist pretext and the horror of ethnic cleansing, behind the grandiloquent rhetoric and the hackneyed phrases he used, the search for power is what motivated Slobodan Milošević. These

23. See for example 'The Princeton Principles on Universal Jurisdiction', published in 2001 by the Program in Law and Public Affairs at the Woodrow Wilson School of Public and International Affairs at Princeton.
24. Neff, *War and the Law of Nations*, p. 340.
25. *Prosecutor* v. *Tadić*, Decision on the Defence Motion for Interlocutory Appeal on Jurisdiction, 2 October 1995, paragraph 97.
26. Williams and Scharf, *Peace with Justice*?, emphasis added.

> were not his personal convictions, even less patriotism or honour or racism or xenophobia which inspired the accused but, rather, the quest for power and personal power at that.[27]

This is a strange accusation for a criminal Prosecutor to make, since 'the search for power' is not a crime under any jurisdiction anywhere, still less a war crime. Yet it was because of this inherent hostility to state authority that stress was increasingly laid on individuals and victims. The nature of warfare as a state act was progressively obscured. In particular, the Yugoslav wars were regarded not as the regrettable outcome of the disintegration of a state, nor even as a conflict in which people were fighting for their lives and for land which they believed to be theirs. They were certainly not understood as having been provoked by the West's own actions or by geopolitical events in the wider world. Instead, they were portrayed as irrational events, a series of violent crimes. This is why the solution was said to be indictment under the criminal law: any search for a political solution to the conflict was denounced as appeasement.[28]

The indictment of Milošević flowed directly from this anti-state ideology. In fact, the dissociation of the criminal justice system from the political organs of a state leads quickly to judicial abuses. It also causes the criminal justice system to be politicised itself: the amount of information required to sustain the Prosecution's claims that Milošević bore political responsibility for the wars, even if they had been well-founded, was simply too great for a fair and expeditious trial, which is why the proceedings dragged on for four years.

The political nature of the ICTY's professional ethic can also be seen in the fact that the Tribunal is not staffed by military lawyers or military officers but instead by human rights activists pursuing a liberal and globalist political agenda. Soldiers and trained military lawyers would be far better suited

27. Trial Chamber, 12 February 2002, p. 9.
28. Williams and Scharf, 'Peace with Justice?,' passim.

to adjudicating war crimes than human rights activists who have never been near a gun. Indictments are drawn up with little or no reference to the fact that the acts in question were committed in battle: one often has the surreal sensation one would have reading a description of one man beating another man unconscious which omitted to mention that the violence was being inflicted in the course of a boxing match. By the same token, various acts have been progressively included into international criminal law which have little to do with war at all. Instead, international humanitarian law concerns itself increasingly with political matters. Just as 'security' was proclaimed by the OSCE to be dependent on the respect of a whole host of human rights, which have nothing to do with war, so rape has recently been made 'an international war crime' even though, like murder, it is already a crime in every single jurisdiction on the planet.

The extraneous political goals of the ICTY have had an immediate and corrosive effect on its judicial practices. In sentencing Dražen Erdemović, a man who pleaded guilty to mass murder, the Trial Chamber ruled:

> The International Tribunal's objectives as seen by the Security Council – i.e. general prevention (or deterrence), reprobation, retribution (or 'just deserts'), as well as collective reconciliation – fit into the Security Council's broader aim of maintaining peace and security in the former Yugoslavia. These purposes and functions of the International Tribunal as set out by the Security Council may provide guidance in determining the punishment for a crime against humanity.[29]

It is difficult to see how the international judicial process can be said to be above politics if such considerations are formally expressed in the ICTY's judgements. (In the event, Erdemović was given a sentence of only five years in prison. The sentence was lenient because Erdemović agreed to cooperate with the

29. Trial Chamber judgment, 29 November 1996.

prosecutor, including in the prosecution of Slobodan Milošević against whom he appeared as a Prosecution witness.)

Other stated aims range even more widely. Huge importance is attached by the ICTY and its supporters to the rights of victims and to the therapeutic value of obtaining convictions. Consider, for instance, the discussion of the threefold 'objectives' of the ICTY in its first annual report dated 29 August 1994:

> The Tribunal will contribute to the peace process by creating conditions rendering a return to normality less difficult. How could one hope to restore the rule of law and the development of stable, constructive and healthy relations among ethnic groups, within or between independent States, if the culprits are allowed to go unpunished? Those who have suffered, directly or indirectly, from their crimes are unlikely to forgive or set aside their deep resentment. How could a woman, who had been raped by servicemen from a different ethnic group, or a civilian whose parents or children had been killed in cold blood quell their desire for vengeance if they knew that the authors of these crimes were left unpunished and allowed to move around freely, possibly in the same town where their appalling actions had been perpetrated? The only civilised alternative to this desire for revenge is to render justice: to conduct a fair trial by a truly independent and impartial tribunal and to punish those found guilty. If no fair trial is held, feelings of hatred and resentment seething below the surface will, sooner or later, erupt and lead to renewed violence.[30]

The rights of victims were mentioned all the time throughout the trial of Slobodan Milošević. Prosecutor Carla del Ponte and the leading Prosecution counsel, Geoffrey Nice, referred repeatedly to 'the victims' at various key points in their opening speeches at the Milošević trial. Carla del Ponte said part of her job was 'to allow the voice of the victims to be heard',[31] and she specifically invoked victims' 'rights' when she called for

30. Report of the International Tribunal for the Prosecution of Persons Responsible for Serious Violations of International Humanitarian Law Committed in the Territory of the former Yugoslavia since 1991, 29 August 1994, paragraph 15.
31. Trial transcript, 12 February 2002, p. 4.

the three indictments in the Milošević trial to be joined into one single trial.[32]

Such emotive passages do little to foster legal clarity, and such reasoning is quite foreign to the judicial process, properly understood. Instead, it is likely to corrupt it. In a normal criminal trial, victims have no special rights whatever. The duty of the court is to apply the law as it stands, and to match the sentence to the gravity of the offence. The heavy emphasis on the rights of victims implies that 'justice' is equivalent to a guilty verdict, come what may, and it comes perilously close to justifying precisely the vengeance which supporters of criminal law say they reject.[33] (This corrupt use of the language has now become commonplace among world leaders: in June 2006, President George W. Bush hailed the US military for 'delivering justice' when they killed the Islamist terrorist Abu Musab Al-Zarqawi.[34] 'Justice', in Bush's lexicon, evidently does not mean a fair trial or even a guilty verdict, but death itself. As it happens, Al-Zarqawi had cut his fighting teeth in Bosnia; but one assumes that Milošević would not have been hailed for 'delivering justice' if Yugoslav forces had killed him in a similar fashion.) Some variants of the criminal justice system in Islamic countries allow the relatives of murder victims to play the role of appellants in a civil suit, for instance by deciding the sentence or fine ('blood money'). It would be ironic if the latest developments in international criminal law were to cause it to start to resemble systems of criminal justice which are generally rejected as atavistic.

A third extraneous goal is that which goes by the name of 'transitional justice'. This means using the judicial process to

32. Carla del Ponte, 11 December 2001, Trial transcript, p. 69.
33. *Stay the Hand of Vengeance: the Politics of War Crimes Tribunals*, by Gary Jonathan Bass, Princeton University Press, Princeton, NJ, 2000. The title of this book is a quotation from Robert Jackson's opening speech at Nuremberg.
34. 'Trophy of a dead terrorist,' by Oliver Poole and Francis Harris, *Daily Telegraph*, 9 June 2006.

promote 'democratisation' and the 'transition to the rule of law' (which in reality means transition to integration into the Western geopolitical orbit). But this overtly political goal is completely incompatible with ordinary justice. As two experts note, 'Using criminal trials of political and military leaders as a way to underscore a political transition and to establish democratic principles has a distinctly illiberal corollary.'[35] Acquittals become politically risky. As one supporter of international criminal justice has said, 'Acquittals of important figures impair the inhibitory effect of international justice on those whom it is most important to deter.'[36] But if a tribunal thinks that its primary goal is to convict people then it is not administering justice; or rather, it is but an instrument in the service of a programme of political change. Meanwhile, the notion that such trials have a politically educational function is itself reminiscent of the 'agitation trials' conducted for the edification of the proletariat in early Soviet Russia.

The promotion of international criminal justice is therefore the equivalent of the idea, practised energetically in Bosnia & Herzegovina, that 'the rule of law' can be introduced by the High Representative (that is, the foreign governor of the state) in the absence of any democratic political consensus. The result of these energetic attempts to impose tolerance and multi-ethnicity from above have led, in Bosnia & Herzegovina, to a completely atrophied political system in which the three constituent peoples of that unhappy republic agree provisionally to remain inside it only on condition that the state has no real power. 'Potemkin democracy' is the result

35. 'Guilty Associations: Joint Criminal Enterprise, Command Responsibility and the Development of International Criminal Law' by Allison Marston Danner and Jenny S. Martinez, *California Law Review* Vol. 93 (2005), p. 96

36. Richard P. Barrett and Laura E. Little, 'Lessons of Yugoslav Rape Trials: A Role for Conspiracy Law in International Tribunals', *Minnesota Law Review*, 30, 32 (2003), p. 88.

in Bosnia – a bogus façade – and the ICTY too produces, at best, 'Potemkin justice'.[37]

37. See David Chandler's article of this title in *The Monist*, January 2007. See Robert M. Hayden, *Blueprint for a House divided: the constitutional logic of the Yugoslav conflicts*, University of Michigan Press, 2000, Chapter 5.

5
Potemkin Justice

LIKE CHARLES I, brought before the specially-constituted High Court of Justice in 1649, Milošević too, refused to recognise the right of the ICTY to try him; however, like Louis XVI, he engaged fully with the judicial process and fought his corner with gusto. However, he must have known that there was precious little chance that he would get a fair trial. From the moment of its inception, it had been clear that the ICTY was to be no ordinary court.

The note was struck at the very beginning by the main architects of the ICTY and its procedures. Michael Scharf, who has become a leading authority on the Yugoslav tribunal and war crimes (even though he has never visited Yugoslavia[1]), was the official at the US State Department who drafted the terms of United Nations Security Council Resolution 771 (13 August 1992), which initiated the process that was to lead to the creation of the ICTY the following year. Scharf admitted that he drafted the Resolution 'in the language of news reports rather than strictly following the legal terminology of the Geneva Convention'.[2] He also admits (indeed even boasts of the fact) that he then helped draft the rules of evidence of the ICTY so as 'to minimise the possibility of a charge being dismissed for lack of evidence'.[3]

1. Scharf confirmed this to this author in Galway in April 2006.
2. Michael Scharf, *Balkan Justice. The Story Behind the First International War Crimes Tribunal since Nuremberg*, Carolina Academic Press, Durham, NC, 1997, p. 39.
3. Scharf, *Balkan Justice*, p. 67.

The entirety of the ICTY jurisprudence is shot through with this cavalier attitude to law and its principles. Perhaps the most shocking violation of legal principles occurred when the ICTY decided to rule on its own legality in its first trial, that of Duško Tadić, in 1995. The defence contested three fundamental points about the ICTY: first, the legality of its establishment; second, its primacy over national courts, and, third, its subject matter jurisdiction (that is, over different types of conflict). The Defence counsel, Michail Wladimiroff, argued that the ICTY was not legal since it was a fundamental right of all defendants to be tried by a tribunal established by law, which the ICTY had not been. The Appeals Chamber considered the question and, not surprisingly, found that the ICTY had been legally created and that it did have the jurisdiction it claimed.[4] Had it found otherwise, the ICTY would have been obliged to close down its operations immediately and the judges themselves would have been out of a job. It is difficult to imagine a worse infraction of the fundamental legal principle that no man should be judge in his own cause.

This ruling in *Tadić* emphasised the fact that the ICTY does not even have a distinct appeals procedure. There is a unified panel of judges who rotate between the Appeals Chamber and the Trial Chamber. None of their decisions are ever referred to any outside body. The Security Council, of which the ICTY is a subsidiary organ, has no real control over the ICTY, which is required only to submit an annual report to the Secretary-General, and there is no oversight by the United Nations General Assembly either.[5] In over ten years, the Security Council has not reviewed or amended any of the substantial decisions on law and liability taken by the ICTY. In other words, the ICTY judges are a law unto themselves.

4. *Prosecutor* v. *Tadić*, Appeals Chamber Decision, 2 October 1995, paragraphs 9ff.
5. This lack of control by the General Assembly was evidently deliberate. See Scharf, *Balkan Justice*, p. 56.

A similarly offhand approach to the law inspired the drafting of the Rules of Procedure of the ICTY, which systematically put defendants at a disadvantage. The first rule of any legal system is that the law must be stable,[6] yet this fundamental rule is broken by the ICTY, whose Rules of Procedure are in a state of permanent flux. Having been drafted in only two months and published for the first time on 11 February 1994, they were further amended twice in 1994, four times in 1995, four times in 1996, twice in 1997, twice in 1998, three times in 1999, twice in 2000, three times in 2001, four times in 2002, three times in 2003, four times in 2004 and five times in 2005. (At the time of writing there has been one further amendment in March 2006. For that matter, the Statute itself has been amended eight times by the Security Council since the ICTY's creation.) In other words, the Rules of Procedure have been changed every three months or so ever since they were originally drawn up. These changes have not been minor. In January 1995, 41 of the 125 rules were changed while in December 2002, 19 rules were changed. Many of these changes have reduced the rights of defendants even though Article 6 of the Rules says that this is not allowed.

Just as the basic legitimacy of the ICTY has not been referred to any exterior legal body, so the Rules of Procedure are not decided upon by any organ outside the ICTY itself. Unlike the International Criminal Court, Article 51 of whose statute requires that changes to the rules of procedure be approved by the Assembly of State Parties – that is, by a governing body that is different and separate from the judges, which oversees all aspects of the Court's functioning, and which makes all the key appointments[7] – the ICTY's Rules of Procedure are decided on by the judges themselves. This represents a dangerous

6. 'Lex debet esse: possibilis, honesta, justa, stabilis,' see *Summarium Theologiae Moralis, Tractatus III, De Lege*, The Newman Bookshop, Westminster, MD, 1944.
7. Article 112 of the Rome Statute (ICC).

confusion between the role of the judge, which is to say what the law is, and the role of the legislator, which is to change or make the law.

Moreover, the procedure for changing the rules is alarmingly simple. The rules are laid out in Article 6 of the ICTY Statute and in the relevant 'Practice Directions' of 1998 and 2001. These allow the Rules of Procedure to be amended in a plenary session meeting of not less than ten judges, or outside a plenary meeting if there is unanimous support. In practice, what happens in this latter case is that one judge sends a fax or an e-mail to the others and if they all agree, then the rules are changed. Never in the history of civilised jurisdictions have judges enjoyed such a right to make their own rules or to change them so easily. It is a sorry comment on the state of Western legal and political thinking that laws can now be made by an exchange of e-mails: one might as well close down all the world's parliaments and call an end to public sessions of legislative bodies.

One of the main reasons for this extraordinary elasticity in the law is that many of the judges at the ICTY are not really judges at all. In a proper criminal jurisdiction, the role of the judge is very specific: the judge must be well-trained in the law and must apply the law as it is. In many jurisdictions, especially in the civil law tradition, the judiciary is a professional body separate from advocacy. Even in common-law jurisdictions, judges are required to have expertise in the specific work of judging. The judge's role is to say what the law is, not to make new law, and still less to apply or make policy.

In the highly politicised ICTY, by contrast, it is very common for people to be appointed to the ICTY bench for reasons other than that they are experienced or respected judges, including for political reasons. In the early days of the Tribunal, for instance, there were judges from four Muslim countries: Egypt, Malaysia, Pakistan and Nigeria. This reflected the huge support for the Bosnian Muslim cause given by Muslim

countries around the world, and the fact that much funding came from them. Concomitantly, a Russian candidate for the ICTY bench was specifically vetoed 'to avoid a pro-Serb bias'.[8] In other words, the pro-Muslim and anti-Serb sentiment which prevailed in the world's media when the ICTY was set up was allowed to have a direct influence on appointments to the ICTY bench.

Similar extraneous factors influenced other judicial appointments. Conrad Harper, who from 1993 to 1996 was Legal Adviser to the US State Department and who asked Gabrielle Kirk McDonald to become a judge at the ICTY,[9] defended the choice by saying, 'McDonald was well qualified as a former federal judge who had heard criminal matters.'

One assumes that Harper was not trying to damn McDonald with this faint praise, but it is a fact that she had very little relevant experience as a judge in criminal cases. She had left her job as a low-paid federal judge to become an attorney working in a law firm on employment law and civil liberties cases and she was about to take up a teaching post at a law school when the call from the State Department came through.

'But,' added Harper, 'she *offered more as a woman, an African-American and someone who had a deep interest in civil rights*. The Clinton administration was interested in nominating a woman for the job on the Tribunal because of the use of rape as an instrument of warfare in the Bosnian conflict.'[10] In other words, Judge McDonald's appointment was driven, at least in part, by tokenism. (Such tokenism has unfortunately made its way into the Rome Statute of the International Criminal Court, Article 36 of which stipulates that there must be 'fair representation of female and male judges'.) McDonald herself was amazed to be asked to apply for the job. She admitted

8. Scharf, *Balkan Justice*, p. 64.
9. 'Judging Tadić', William Horne, *The American Lawyer*, 1995.
10. Brenda Sapino, 'Gabrielle McDonald's Star Turn', *Texas Lawyer*, 2 October 1995. Quoted by Scharf, *Balkan Justice*, p. 64. My emphasis.

that she had no knowledge of international law and that she was therefore professionally unqualified to sit as a judge in an international tribunal: 'But I don't know anything about international war crimes,' she told Harper. He did not care. 'That's not a qualification,' he replied. 'You'll learn.'[11]

As it happens, McDonald's strange conception of the law led her later to participate in a mock 'trial' of the Japanese Emperor Hirohito in December 2000, shortly after she left the ICTY. A pressure group calling itself the Women's International War Crimes Tribunal on Japan's Military Sexual Slavery held a mock judicial 'hearing' into the use of 'comfort women' by Japanese soldiers in the Second World War. At the end of the performance, McDonald proclaimed, as if she were a judge sitting in a real court of law, that Hirohito was 'guilty of responsibility for rape and sexual slavery as a crime against humanity'. She did not seem to mind either that she risked bringing her office into disrepute by participating in such a grotesque charade, or that the accused man could not exactly defend himself against these charges since he had been dead since 1989.

Similar problems have bedevilled the ICTY bench throughout its existence. Prior to his appointment to the ICTY, the present president (in 2006), Fausto Pocar, was not a judge but a law professor and a former United Nations employee. The ICTY's very first president, Antonio Cassese, was a law professor who had worked for the Italian government and chaired the torture committee of the Council of Europe. Judge Patrick Robinson, who took over as the presiding judge at the Milošević trial, had also not been a judge but had instead worked as a legal adviser to the government of Jamaica and had sat on various 'great and good' para-governmental committees. Judge Güney of Turkey was not a judge but a career diplomat who had served as a Turkish ambassador in three different countries over a period

11. 'Profile of Gabrielle Kirk McDonald', by Kitty Felde, *Human Rights Brief*, Vol. 7, Issue 3, 2000, p. 2.

of ten years. Judge Dagun of China had worked as a legal adviser to the Chinese government and had been a professor of law. Judge Meron, who became President of the ICTY after Cassese, had been a successful law professor in the United States but never a judge. There are many other examples. Even Judge May, the presiding judge at the Milošević trial until his resignation in February 2004, who had worked as a judge on the Oxford & Midlands Circuit in the UK, was also a lifelong member of the Labour Party and political activist.

It is perhaps because so many of the judges come from political or academic, rather than judicial, backgrounds that they have repeatedly ruled that they should not be restricted by too many rules. In the first annual report of the ICTY, the judges said that they had 'mould[ed] [the ICTY's] rules and procedures to fit the task in hand',[12] while in its ruling on the admissibility of evidence in the Aleksovski trial, the Appeals Chamber of the ICTY ruled that 'The purpose of the rules is to promote a fair and expeditious trial and the Trial Chambers must *have the flexibility* to achieve this goal.'[13] Discussing established legal procedures in other jurisdictions, the judges declared arrogantly in their first annual report that 'This Tribunal does not need to shackle itself to restrictive rules which have developed out of the ancient trial-by-jury system',[14] an odd way to dismiss an august legal inheritance on which the judges should consider themselves privileged to be able to draw. It is ironic that this deliberate weakening of procedure is justified in the name of the fact that there is no jury in the ICTY, and that 'professional judges'[15] are qualified to assess the evidence in a way that amateur jurors would not

12. Annual report, 1994, paragraph 75.
13. *Aleksovski*, Appeal Chamber Decision on Prosecutor's appeal on admissibility of evidence, 16 February 1999, paragraph 19.
14. ICTY Annual report, 29 August 1994, paragraph 72.
15. *Delalić et al.*, Trial Chamber Decision on the motion of the Prosecution for the admissibility of evidence,' 19 January 1998, paragraph 20.

be, since in fact many of the ICTY judges have never before sat on a bench.

The ICTY's attitude to the law itself is as sloppy as it is to procedure. One of the key questions any international criminal trial must address is whether an international armed conflict existed at the time of the alleged acts. This is because the international laws of war come into force, generally speaking, only in international conflicts: the laws of war are structured to govern situations in which the jurisdiction of a state is not in force because its territory is occupied by another state. (There has been much erosion of this important jurisdictional principle by the human rights activists who have colonised the laws of war, not least by the rulings of the ICTY itself.) In *Tadić*, the defendant was initially acquitted of all the charges brought against him under the terms of the Geneva Conventions, referred to in Article 2 of the ICTY Statute, because the Appeals Chamber ruled that the conflict in Bosnia-Herzegovina had not been international. Indeed, the Chamber has said that to classify the conflict as international would lead to 'an absurd outcome',[16] namely, that if the Bosnian Serbs were held to be agents of a foreign power, in this case Yugoslavia, then any civilians mistreated by them would be classified as protected persons under the terms of the Geneva Conventions, whereas any Bosnian Serb civilians mistreated by the authorities of the Republic of Bosnia & Herzegovina would, being citizens of Bosnia & Herzegovina, not enjoy such protection.

This decision was overturned four years later, when the same Appeals Chamber ruled that the conflict in Bosnia had been international after all. In the course of reaching this conclusion, the Chamber discussed the question of criminal responsibility for forces under the control of another state, overruling the

16. *Prosecutor* v. *Tadić*, Appeals Chamber Decision on the Defence Motion for Interlocutory Appeal on Jurisdiction, 2 October 1995, paragraph 76.

existing law on the matter as explained in the International Court of Justice ruling on *USA* v. *Nicaragua* in 1986. Its own justification for this overruling betrays the contemptuous attitude of the ICTY judges towards legality and precedent: 'Generally speaking,' the Appeals Chamber ruled:

> it can be maintained that the whole body of international law on State responsibility is based on a realistic concept of accountability, *which disregards legal formalities* and aims at ensuring that States entrusting some functions to individuals or groups of individuals must answer for their actions, even when they act contrary to their directives.[17]

By this reasoning, the Appeals Chamber decided that what it had earlier said would lead to 'an absurd outcome' was, after all, the case. It is impossible to have confidence in a court which changes its mind like this and operates on the principle that legal formalities should be disregarded.

Throughout these various amendments to the rules of procedure and the jurisdiction of the Tribunal, the tendency has always been to reduce the rights of defendants, and to lower the level of proof required to secure convictions. At the ICTY, defendants are at a structural disadvantage. The Office of the Prosecutor is an integral part of the Tribunal, whereas the Defence is structurally outside it. The Prosecutors are protected by diplomatic immunity on equal footing with the judges and the Registrar while defence lawyers are not.[18] The Rules of Procedure of the Tribunal may be changed on the basis of a proposal from the judges, the Registrar or the Prosecutor, but not on the basis of a proposal from the Defence.[19] The Defence receives a mere fraction of the budget of the ICTY as a whole, and many lawyers who have appeared as defence counsel have attacked the imbalance as incompatible with the

17. Appeals Chamber, *Prosecutor* v. *Duško Tadić*, Judgment, 15 July 1999, paragraph 121, emphasis added.
18. ICTY Statute, Article 30.
19. ICTY Statute, Article 6.

right to a fair trial. No wonder a British judge who previously appeared as a Defence counsel at the ICTY has written, 'Some of the limitations that have been imposed upon the defence run counter to the idea of any level playing field as between the defence and the prosecution, and strike at the very heart of professional effective representation.'[20]

The ICTY, indeed, is an essentially prosecutorial organisation. Its whole philosophy and structure is accusatory. This philosophy can be seen in the very words of the United Nations Security Council Resolution 827 (25 May 1993), which established the Tribunal '*for the sole purpose of prosecuting* persons responsible for serious violations of international humanitarian law committed in the territory of the former Yugoslavia'.[21] A tribunal whose 'sole purpose' is prosecution is evidently not in the business of acquittal. It is also strange to refer to prosecuting 'persons responsible' for crimes, because a person is not deemed responsible in law until after conviction, not at the time of prosecution. Andrei Vishinsky, the Soviet prosecutor who orchestrated the Moscow show trials and who was later a prime mover behind the Nuremberg trials,[22] is reputed to have said to worried British and American judges, 'Don't worry, only the guilty will be put on trial.' This sentiment seems alive and well at The Hague: the sentence should have read 'prosecuting persons *accused of committing*, etc'.

This accusatory ethic has had a profound influence on the decisions taken by the judges, especially where the rules of procedure and evidence are concerned. In their first annual report in 1994, the judges admit that they drew up the rules

20. Howard Morrison, QC, 'The Quest for Justice', *Counsel*, June 2001, p. 14.
21. United Nations Security Council Resolution 827, 25 May 1993, emphasis added.
22. George Ginsburgs, *Moscow's Road to Nuremberg: the Soviet background to the trial*, Martinus Nijhoff, The Hague, 1996, p. 65; Aron Naumovich Trainin, *Hitlerite Responsibility under international law*, ed. A. Ia. Vishinsky, translated by A. Rothenstein, London, 1945.

quickly (with a lot of help from 'states and a number of non-governmental organisations') because 'The Tribunal felt that it was under a moral obligation to commence proceedings as quickly as possible so that all parties, whether victims or perpetrators, local participants or distant spectators, could see that such flagrant abuses of human rights will not be allowed to go unpunished.' It did not consider that its first priority was to make sure that its procedures were of the highest standards to prevent the wild accusations which are always made in wartime from being translated into kangaroo-court justice.[23]

These institutional arrangements and this philosophy have led to an unacceptable closeness between the judges and the Office of the Prosecutor (OTP). In 2000, the first president of the ICTY, Antonio Cassese, boasted of the fact that he had suggested to the Prosecutor that indictments be issued for higher-ranking officials. Prior to his suggestion, only low-level soldiers (actual perpetrators) had been indicted. Cassese said that he had taken the Prosecutor aside and discretely suggested that the OTP go after bigger fish like Radovan Karadžić and Ratko Mladić.[24] (He told his audience with something of a smirk that, of course, the judges and the Prosecutors were supposed to be separate, and that they were not even supposed to have access to the floors of the building in which the others worked, but that he, as President of the Tribunal, did have a special pass to gain access to the Prosecutors' office.) Judge Cassese's enthusiasm for indictments was again reflected when he called on countries (he meant principally Yugoslavia) to be excluded from the Olympic Games in Atlanta if various indictees were not handed over.[25] Such enthusiasm for prosecution is incompatible with the kind of impartiality one expects from a judge, who is supposed to stand above the

23. ICTY Annual Report, 29 August 1994, paragraph 56.
24. Lecture given at the London School of Economics, 13 November 2000.
25. ICTY Press release, 13 June 1996.

Prosecution, to assume innocence and to administer justice, whatever people's expectations.

One of the key problems with the ICTY's modus operandi is that it mixes elements from the adversarial judicial system prevalent in the English-speaking countries with elements from the inquisitorial system prevalent in continental Europe. Ultimately both systems have their advantages and disadvantages. However, when the two systems are mixed up with one another, as the ICTY has done, the combined result lacks coherence. In particular, the checks and balances inherent in each system fail to operate, because elements from each tradition have been cherry-picked.

For instance, in the adversarial system, the judge is basically an adjudicator between two litigants who are allowed to present their case to the best of their abilities within the rules. This system gives the Prosecution a very wide berth but this is compensated by the fact that the Defence is supposed to be on an equal footing. Moreover, the barrier of proof is set very high: the Prosecution must establish its case beyond reasonable doubt. In the inquisitorial system, the judge himself plays an investigative role and the original prosecution documents are themselves drawn up by magistrates. This gives the state judge and the state Prosecutor considerable powers, and there are grounds for saying that the defendant has fewer rights than in the common-law adversarial system. However the law in civil law systems also places considerable restrictions on the activities of investigating magistrates. Their role is to conduct an investigation, not just a prosecution, and this means that they must include in their reports any exculpatory material as well as accusatory. The investigating magistrate is professionally required to establish the truth, not to score a courtroom victory. It is incompatible with the required professionalism of a prosecuting magistrate to engage in acts of high-profile publicity, such as those performed by Carla del Ponte who, at the beginning of the Milošević trial, was often on the lawn

outside the Tribunal giving press conferences and firing off wild accusations against the ICTY's star defendant. Untangling these coherent legal systems, and then cobbling together bits of them in a new arrangement, as the ICTY has done, means that the worst aspects of both systems have been integrated into a dysfunctional hybrid.

The ICTY operates within a culture of secrecy. Article 53 of the Rules of Procedure provides for the 'non-disclosure' of documents: this means that indictments can be drawn up in secret, as they often are. The ICTY has used this to trap its indictees: General Momir Talić was arrested on 25 August 1999 while travelling to Vienna to attend an OSCE conference, on the basis of an indictment, which had been drawn up in March and published only in part, with Talić's status as a co-indictee kept secret.[26] News reports revealed that Talić had had regular contacts with the SFOR (Stabilisation Force) troops in Bosnia in the months before his arrest, and therefore presumably had assumed that there was no warrant for him.[27] The terms governing such secret indictments are extremely wide:

> A Judge or Trial Chamber may, in consultation with the Prosecutor, also order that there be no disclosure of an indictment, or part thereof, or of all or any part of any particular document or information, if satisfied that the making of such an order is required to give effect to a provision of the Rules, to protect confidential information obtained by the Prosecutor, or is otherwise in the interests of justice.[28]

The ICTY extends this secrecy to witnesses, many of whom are allowed to give evidence anonymously and/or in secret if it is deemed that giving testimony in open court would be

26. 'Tribunal Update 140 (Last week in The Hague, 23–29 August 1999)', 2 September 1999, *Institute of War and Peace Reporting*.
27. These news reports, from the German weekly magazine, *Stern*, were discussed by Jim Landale, the ICTY spokesman, at his weekly press briefing on 29 September 1999.
28. Article 53, Rules of Procedure (revised 30 January 1995).

dangerous for them. Such protective measures, which are granted only in very exceptional circumstances in domestic jurisdictions, have now become normal in the ICTY, even though hiding the identity of a witness even from the defendant contravenes a basic principle of criminal law that every person accused of a crime has a right to know who is appearing as a witness for the Prosecution and to cross-examine them. It now happens very often that defendants at the ICTY are confronted by accusations made by people whose identity is hidden from them, or who give evidence by video link and whose voices are disguised by electronic means with their faces hidden.

In making its ruling in favour of anonymous or protected witnesses, the Trial Chamber decided to disregard the provisions of the European Convention on Human Rights and the International Covenant on Civil and Political Rights (respectively Article 6 and Article 14), which deal with the conditions for a fair trial. These documents both specify that one of the 'minimum rights' afforded any defendants is the right 'to examine witnesses against him'. The wording of these articles has been integrated into the ICTY's own Statute on the Rights of the Accused (Article 21). Yet the ICTY justified disregarding these 'minimum guarantees' by saying, first, that it was operating within the context of a then ongoing conflict and, second, that, because it was not connected, via the structures of a state, to a police force, it could not ensure the security of witnesses. (This shows how dissociating a criminal justice system from a state damages the rights of the accused and allows the ICTY to restrict the rights of the people it puts on trial.[29]) The ICTY justified overruling its own Statute and key international human rights documents by saying that it had to 'interpret its provisions within its own legal context

29. I am grateful to Kosta Čavoški's 'The Hague against Justice: International Criminal Fiasco in the case of Tribunal Prosecutor v. General Djordje Djinkić', Centre for Serbian Studies, Belgrade, 1996, p. 42, for this point as well as for other extremely pertinent criticisms of the ICTY, many of which I used for this chapter.

and not rely in its application on interpretations made by other judicial bodies'. It went on:

> The interpretations of Article 6 of the ECHR by the European Court of Human Rights are meant to apply to ordinary criminal and, for Article 6 (1), civil adjudications. By contrast, the International Tribunal is adjudicating crimes which are considered so horrific as to warrant universal jurisdiction. *The International Tribunal is, in certain respects, comparable to a military tribunal, which often has limited rights of due process and more lenient rules of evidence.*[30]

As even a vigorous supporter of international criminal justice as Geoffrey Robertson has rightly commented, criticising this decision, 'The more "horrific" the crime, the more due process is necessary.'[31] The decision to allow anonymous and secret testimony was arrived at by a 2:1 majority in the Trial Chamber, in spite of the fact that in the United States, the jurisdiction where the presiding judge, Gabrielle Kirk McDonald, came from, anonymous testimony is strictly forbidden by the Confrontation Clause of the Sixth Amendment.

The reasons why anonymous testimony is solemnly forbidden in many jurisdictions, and why testimony via video link is also severely restricted, is that it is believed that witnesses should come to the court in person and give testimony under oath, in conditions where they can be cross-examined properly by the defence and where their demeanour can be properly observed by all present. A criminal trial can to some extent be compared to a laboratory in which experiments are carried out under test conditions. Just as in a laboratory, all extraneous elements are excluded in order to ensure the purity of the events observed, so a criminal trial is a specific environment in which evidence is subjected to strict examination under agreed

30. Trial Chamber Decision on the Prosecutor's Motion Requesting Protective Measures for Victims and Witnesses, 10 August 1995, paragraph 28, emphasis added.
31. Geoffrey Robertson, 'War crimes deserve a fair trial', *The Times*, 25 June 1996.

procedures. Witnesses are called to court precisely so that the veracity of their claims can be tested by cross-examination. Their demeanour and the inner coherence of their account are legitimate elements for consideration when evaluating their claims. Without this, it is widely accepted, a court cannot decide whether the testimony is worthy of belief.[32]

The dangers of allowing witnesses to give testimony anonymously became clear very quickly: in the trial of Duško Tadić, a star witness, 'Witness L', who gave evidence anonymously and in closed session, but who later turned out to be a Bosnian Serb called Dragan Opačić, was dropped by the Prosecution after he was forced to admit that he had lied under oath, having been tortured by the Bosnian Muslim authorities who were then holding him in captivity.[33] (Tadić was also accused by another anonymous witness, G, of having forced a man to bite off a prisoner's testicles in the Omarska camp where he was a guard, yet the Tribunal did not find evidence to convict him on this sensational charge either.)

It is not surprising that this disgraceful decision to allow anonymous witnesses was criticised at the time in a Separate Opinion given by one of the judges, the Australian, Sir Ninian Stephen.[34]

> The right to a fair administration of justice holds so prominent a place in a democratic society … that it cannot be sacrificed to expediency … If the defence is unaware of the identity of the person it seeks to question, it may be deprived of the very particulars enabling it to demonstrate that he or she is prejudiced, hostile or unreliable. Testimony or other declarations inculpating an accused may well be designedly untruthful or simply erroneous and the defence will scarcely be able to bring this to light if it lacks the

32. See US Supreme Court Opinion, *Maryland* v. *Craig*, 27 June 1990.
33. Trial transcript, 25 October 1996. See also Trial Chamber Decision on Prosecution Motion to Withdraw Protective Measures for Witness L, 5 December 1996.
34. *Prosecutor* v. *Duško Tadić*, 10 August 1995, Separate Opinion of Judge Stephen on the Prosecutor's Motion Requesting Protective Measures for Victims and Witnesses.

> information permitting it to test the author's reliability or cast doubt on his credibility. The dangers inherent in such a situation are obvious.[35]

Stephen says that the Statute rightly gives more weight to the rights of the accused than to the interests of witnesses and that, in any case, protective measures, such as those sometimes used in rape cases, imply elements such as *in camera* proceedings, not the wholesale anonymity of witnesses. Stephen carefully explained how the Tribunal's own Statute limited the use of anonymous witnesses to 'exceptional circumstances', and said that the Statute should not be interpreted as allowing the Prosecution to keep the identity of the witness secret even from the Accused. He is right: the ICTY's own Statute requires that any decisions about protecting witnesses be taken only 'with *due regard* for the protection of victims and witnesses' but while maintaining '*full respect* for the rights of the accused'.[36] This has clearly not been observed.

Stephen also quotes relevant rulings from the European Court of Human Rights, which explicitly said that the rights of a defendant had to remain paramount. He also quoted rulings from other jurisdictions, but to no avail. His two colleagues on the bench voted in favour of allowing anonymous witnesses and the practice has now become commonplace. In 2003, the ICTY itself admitted that only 60 per cent of its witnesses had given evidence openly, that is, fully 40 per cent of them were anonymous or gave their evidence in closed session.[37] In the Milošević trial, the anonymity of witnesses was used very widely by the Prosecution: 98 of the Prosecution's 296 witnesses, that is, 33 per cent of the total, gave testimony anonymously (although in some cases their identity was revealed later). By

35. Stephen is quoting 'Leading case of *Kostovski* 1989, Series A No. 166, the European Court of Human Rights'.
36. ICTY Statute, Article 20.1, my emphasis.
37. Press Release, 2 December 2003, CC/P.I.S./805-e. First Conference between Health Professionals from the former Yugoslavia and the ICTY on Witness Welfare.

contrast, Milošević himself called no anonymous witnesses and asked for no sessions to be held in secret. Milošević's Defence was more transparent and open than the Prosecution.

There is no doubt that the use of anonymity has been greatly abused in other trials too. In the trial of Bosnian Croat Tihomir Blaškić, a protected witness gave evidence for the Prosecution 16–19 March 1998. The sessions were closed and so no one outside the court knew either the identity of the witness or the content of his testimony. However, this information eventually leaked out and was widely discussed in the Croatian press because the witness was Stjepan Mesić who by then had become president of Croatia. It was suggested that he had wanted to keep his identity secret in 1998, when he had been a mere opposition politician, because although he wanted to secure the conviction of Blaškić whom the then government of Franjo Tudjman was supporting, he did not want his identity revealed for fear of being branded a traitor. In other words, he obtained protected witness status for reasons of pure political advantage. (In an act of considerable authoritarianism, the ICTY Prosecutor then issued arrest warrants against six Croatian journalists, all of them critics of the Tribunal, and one of them the former editor of the major national daily, *Slobodna Dalmacija*. They had all mentioned Mesić's identity in their articles, even though by then it was a matter of common knowledge and had even been admitted by the President himself. His identity had also been revealed in publicly available ICTY documents.[38] These indictments were eventually withdrawn in June 2006.[39])

The ICTY can also hold 'closed sessions', in which the testimony is secret, and it can 'redact', that is, censor the

38. Press Briefing, 17 July 2003, last paragraph; see also *Blaškić*, Decision of Trial Chamber I on the Requests of the Prosecutor of 12 and 14 May 1997 in Respect of the Protection of Witnesses, 6 June 1997.
39. See the Separate Opinion of Judge Bonomy in the Motion for Leave to withdraw the Indictments against Stijepan Šešelj, Domagoj Margetić and Mirajan Križić, 20 June 2006.

transcript. Both these measures are used very widely, including in the Milošević trial which went in and out of closed session frequently, at the Prosecution's request. This is incompatible with the provision in the Tribunal's own Statute that defendants have the right to 'a fair and public hearing'.

The procedures for allowing sessions to be declared 'closed' are worryingly flexible. The relevant Rule 79 is subject to no clear limitations: a session can be declared 'closed' simply if it is 'in the interests of justice'. This phrase, which was also used to impose defence counsel on Slobodan Milošević, is both elastic and nugatory. It is elastic because nowhere is it specified what 'the interests of justice are' which may justify a closed session; it is nugatory because everything which the ICTY does ought to be in the interests of justice. In practice, it means that a session can be closed instantly on the request of the Prosecution. On 3 October 2002, for instance, Slobdan Milošević was cross-examining an anonymous witness, C-037. The exchange went as follows:

> Milošević: Now, I'm interested in another matter. I'm not sure that it's correct, but you'll give me your answer and then I'll know. Is it true and correct that in November 1991 you were first accused in a trial before the Croatian authorities that was –
>
> Ms. Uertz-Retzlaff (the Prosecuting counsel): May I interrupt here?
>
> Judge May: Yes. Closed session.[40]

Permission to go into closed session was, as one can see, granted immediately without any review about any of the conditions for it laid down in Rule 79. The transcripts simply show 'redacted' for the following moments (we do not know how long) and when the discussion resurfaces in open session, it has moved on to something else. The public will never know whether the witness, anonymous witness C-037, was accused of a crime or what the outcome was if he was. The widespread use of closed sessions is incompatible with the stated aim of the

40. Transcript, 3 October 2002, p. 10805.

ICTY to cast light on the events which took place in Yugoslavia during the various wars from 1991 onwards. On the ICTY website, 'Establishing the facts' is listed as the second 'core achievement' of the ICTY and yet many of the facts remain hidden from public view by the use of closed sessions.

Rule 54*bis* extends the culture of secrecy still further. It provides that if the Prosecutor is in possession of information which has been obtained by the secret services of a state, and if disclosure of that information is deemed contrary to the interests of those security services, then the information may be withheld, even from the accused and even if the non-disclosure is harmful to the defence case. Rule 66 of the Rules of Procedure allows the Prosecutor to apply for non-disclosure of information including evidence if it 'for any other reasons may be contrary to the public interest or affect the security interests of any State'. These rules mean that the ICTY often admits evidence which has been obtained illegally. Not surprisingly, the ICTY is very deferential to the security interests of the powerful Western states which pay for the Court and is very intolerant towards the security interests of former Yugoslav states whose governments it does not like. For instance, when the former Supreme Commander of NATO, General Wesley Clark, testified in the Milošević trial, the US government was allowed to censor the transcript before it was released to the public.[41] By contrast, in the trial of General Tihomir Blaškić, the Appeals Chamber dismissed Croatia's appeal against an order from the Trial Chamber demanding certain documents: Croatia had protested that producing them would prejudice its national security.[42] The Appeals Chamber said that Croatia was obliged to surrender the documents and that, if it did not, it would be referred to the UN Security Council. This duly happened two years later, in 1999.

41. Transcript, 15 December 2003, p. 30368.
42. *Blaškić*, Appeals Chamber Judgment on the Request of the Republic of Croatia for Review of the Decision of Trial Chamber II of 18 July 1997, 29 October 1997.

A further weakening of the burden of proof was caused when the ICTY decided to allow hearsay evidence.[43] Hearsay evidence is when a witness says that someone told him something; it is usually inadmissible in common-law systems. The reason for this inadmissibility is the same as the reason why anonymous witnesses are generally forbidden: hearsay evidence has no value because the demeanour of the originator of a piece of information cannot be tested if he is not in court. Another reason why hearsay is generally inadmissible is that accusations, such as those made by Prosecution witnesses, should be made only under oath. If witnesses lie, they can be convicted of perjury but obviously no such constraints apply when people are speaking among themselves outside a court. But if claims are brought before the court through hearsay, which cannot be tested by cross-examination, then the key right of an accused to examine or have examined witnesses against them is undermined. The ICTY decided to permit hearsay evidence as soon as it drew up its procedures. The judges expressed the view that they were well qualified to assess the probative value of any hearsay evidence even though, as we have seen, many of them are not in fact experienced judges at all.

As if this were not enough, various articles of the Statute allow the Prosecutor to appeal against the acquittal of a defendant. This happens frequently. This practice infringes one of the oldest principles of law, known as *non bis in idem* or 'double jeopardy', according to which a defendant may not be tried for the same crime twice. This fundamental principle has existed in English law since at least the fifteenth century; it is expressed in the double jeopardy clause of the Fifth Amendment of the United States' constitution, and it even exists in the ICTY Statute. Yet Article 25 of the ICTY Statute allows the Prosecutor a general right of appeal against an acquittal. Worse, Article 99 of the Rules of Procedure (entitled 'Status

43. See *Prosecutor* v. *Duško Tadić*, Trial Chamber Decision on Defence Motion on Hearsay, 6 August 1995.

of the Acquitted Person') allows the continued detention of a person who has been acquitted in his trial, that is, of a person whose innocence has just been confirmed:

> If, at the time the judgement is pronounced, the Prosecutor advises the Trial Chamber in open court of the Prosecutor's intention to file notice of appeal pursuant to Rule 108, the Trial Chamber may, on application in that behalf by the Prosecutor and upon hearing the parties, in its discretion, issue an order for the continued detention of the accused, pending the determination of the appeal.

In other words, the ICTY can imprison a person whom it has just found innocent.

6
'Just convict everyone'

BY THE TIME of Slobodan Milošević's second appearance in the courtroom of the ICTY, it was already obvious that the Prosecution was in difficulty. A second pre-trial hearing was held on 30 August 2001, at which Carla del Ponte admitted that she still could not say whether the indictment would be subject to further amendments. In the event, it was amended a second time, on 29 October 2001. She also said that the Prosecution was intending to publish two further indictments, on Croatia and Bosnia, which duly happened on 8 October 2001 and 22 November 2001. (The Croatia indictment was amended on 23 October 2002 and again on 28 July 2004, while the Bosnia indictment was amended on 21 April 2004 – after the Prosecution had completed its case!) When Judge May asked Milošević if he had anything to say, the former Yugoslav president replied sarcastically (speaking in English):

> That was very interesting what I heard now, and that is proving what I said 3rd of July in this room, that that is false indictment. I was indicted 26th of May, 60th day of NATO aggression against Yugoslavia, when I was defending my country; and there are two and a half years from that date, and we just heard that they have no evidence, that they cannot complete indictment, in two and a half years. It is very long time for false indictments to be completed, and what we heard, that was proving that.[1]

1. Trial transcript, 30 August 2001, p. 20.

It was a good point. August 2001 was indeed over two years after the end of the war over Kosovo. It was also six years since the conclusion of the Dayton Agreement which had ended the civil war in Bosnia, over six years since the main atrocities of that conflict, such as Srebrenica, and ten years since the main conflict in Croatia. Why had it taken so long to issue indictments for Bosnia and Croatia? In 1995, the Prosecutor had considered and rejected arguments that Milošević should be indicted for Bosnia.[2] The surreal situation was that the Prosecution had waited for between seven and ten years before deciding to indict Milošević for the earlier Balkan wars, and yet, even after two years of investigation in a NATO-occupied Kosovo, was not ready to start prosecution on the original indictment. Were these two facts connected?

The extravagant claims made by NATO during the bombing of Yugoslavia were obviously incapable of standing up in court. The Prosecution might as well have tried to prove the existence of weapons of mass destruction in Iraq. In the absence of evidence for ethnic persecution in Kosovo, the Prosecution evidently decided to cast the net as widely as possible in the hope that it might 'get' Milošević for Bosnia and Croatia instead.

Instead of coming up with new evidence on Kosovo, moreover, the Prosecution also decided to tinker with that original indictment in a very important way. A first amendment to the Kosovo indictment was published on 29 June 2001, the day after Milošević arrived in The Hague: it added in new lists of names of people allegedly killed, but nothing dramatic. The total casualty list was still in the low hundreds. It then issued the second amended indictment on Kosovo on 29 October 2001. The casualty lists were slightly augmented again but the key difference was that Milošević was now accused of

2. Michael Scharf, *Balkan Justice. The Story Behind the First International War Crimes Tribunal since Nuremberg*, Carolina Academic Press, Durham, NC, 1997, p. 90.

something which had not been mentioned in the first two versions of the indictment: participation in 'a joint criminal enterprise'. Hereby hangs a tale.

Command responsibility and joint criminal enterprise

In the first and second versions of the Kosovo indictment, Milošević and his co-indictees were accused of 'individual criminal responsibility' for various crimes.[3] The phrase is the title of Article 7 of the ICTY Statute, and it is a cornerstone of the philosophy of international criminal justice that individuals in positions of power are individually responsible for state acts, just as criminals are responsible for criminal acts. This reflects the overall view, mentioned in Chapter 4, that acts of state are in fact the result of the private criminal intent of political leaders, not intelligible reactions to events by those collective entities known as nations.

This philosophy has numerous consequences. The first is that, where commanders are on trial, a huge amount of evidence is typically presented at The Hague in order to describe the whole pattern of events which they allegedly controlled. The more powerful they were, the greater the amount of ground which needs to be covered. In Milošević's case, the introduction of indictments for Croatia and Bosnia meant that ten years of Balkan history were on trial. Given that it can take several weeks for a single murder to be tried in England, it is clear that trials of political leaders are necessarily huge and unwieldy. The Milošević trial essentially broke down under the weight of material presented by the Prosecution.

Second, the doctrine of individual criminal responsibility means, paradoxically, that defendants can be accused of liability for crimes which they did not themselves commit. If the Prosecution can show that a defendant gave an order to

3. Initial Kosovo indictment, 22 May 1999, paragraph 83; see also paragraph 55 of the first amended indictment for Kosovo, 29 June 2001.

commit a war crime, then guilt is easy to establish. But if there is no proof of such an order, and if the defendant is not an actual perpetrator but merely supposed to be responsible by virtue of his political or military position, then recourse must be had to secondary forms of proof.

The jurisprudence on this question of the criminal liability of commanders for acts committed by their troops is thin. The most famous case (because contentious) is that of General Tomoyuki Yamashita, the Japanese general who in 1946 was executed by the Americans for crimes committed by Japanese soldiers in the Philippines during the Second World War. There was no evidence that Yamashita had ordered his men to commit crimes, nor even that he knew of the atrocities they were committing. His defence was that his lines of communication had broken down and that he could not control his troops. However, the courts found that he had condoned a climate of lawlessness and, the case having gone to the US Supreme Court, and that court having ruled by a majority against him with two strongly dissenting opinions, he was found guilty and hanged.

Another important case in international law concerning command responsibility is the International Court of Justice ruling in *USA* v. *Nicaragua* in 1986. Nicaragua took the United States to the International Court of Justice for various hostile acts, including for the creation and funding of the Contras who were trying to overthrow the Sandanista government. One of the questions the Court considered was whether the fact that the US had created the Contras and paid for them meant that they were liable for their actions. The Court found generally against the United States, which refused to appear before the Court whose jurisdiction the US contested, but on the question of command responsibility the Court's interpretation of the law was very restrictive:

> The Court has taken the view … that United States participation, even if preponderant or decisive, in the financing, organizing,

> training, supplying and equipping of the *contras*, the selection of its military or paramilitary targets, and the planning of the whole of its operation, is still insufficient in itself, of the basis of the evidence in the possession of the court, for the purpose of attributing to the United States the acts committed by the *contras* in the course of their military or paramilitary operations in Nicaragua. All the forms of United States participation mentioned above, and even the general control by the respondent State over a force with a high degree of dependence on it, would not in themselves mean, without further evidence, that the United States directed or enforced the perpetration of the acts contrary to human rights and humanitarian law alleged by the applicant State. Such acts could well be committed by the *contras* without the control of the United States. For this conduct to give rise to legal responsibility of the United States, it would in principle have to be proved that the State had effective control of the military or paramilitary operations in the course of which the alleged violations were committed.[4]

This jurisprudence should have guided the ICTY, especially since the indictment of Slobodan Milošević turned precisely on whether he had de facto control over armed forces in Croatia and in Bosnia-Herzegovina over which he had no *de jure* control whatever. (Milošević was president of Serbia until 1997.) As shall be seen, the ICTY turned the *Nicaragua* jurisprudence on its head and adopted instead the most wide-ranging concept of criminal liability which exists anywhere in the world.

According to the ICTY Statute, a superior is responsible for acts committed by his subordinates 'if he knew or had reason to know that the subordinate was about to commit such acts or had done so and the superior failed to take the necessary and reasonable measures to prevent such acts or to punish the perpetrators thereof'.[5] This means that a commander can be found guilty of acts even if he did not know that they were

4. Case concerning Military and Paramilitary in and against Nicaragua (*USA* v. *Nicaragua*), International Court of Justice, 27 June 1986, paragraph 115.
5. Article 7(3).

being committed, providing that the Prosecution can show that his ignorance was culpable and that he was therefore guilty of neglecting his duties as a commander. Most criminal jurisdictions recognise the concept of wilful blindness, which is almost equivalent to actual knowledge.[6]

However, even if wilful blindness can be proved, it is not clear that this doctrine of command responsibility is compatible with the actual crimes listed in Articles 2 to 5 of the ICTY Statute. The list of those crimes is replete with adjectives like 'wilful' and 'deliberate', and therefore it is impossible to see how convictions could be obtained for such crimes if the commander did not know they were occurring. Negligence is not the appropriate legal category to deal with the allegations made against powerful leaders: the accusation made against Milošević was not that he failed in his duties as a commander to control his troops but that he masterminded things. It was on the basis of this claim that the rules of the international system had been torn up. For ten years, the demonisation of Milošević had been intense. It would have been odd to convict him only of negligence.

Indeed, the Prosecution did precisely allege that there was wilful conduct, namely that all three indictments were part of a single 'transaction', the project to ethnically cleanse parts of Croatia, Bosnia and then Kosovo in an attempt to create a Serb-dominated state. This plan or transaction went by the shorthand name 'Greater Serbia'. As part of this new claim, the Prosecution inserted a new paragraph into the third version of the Kosovo indictment, issued in October 2001, which followed the ones in the earlier two versions dealing with 'individual criminal responsibility'. The new paragraph read as follows:

6. Glanville Williams, *Criminal Law*, 2nd edn, 1961; quoted by William A. Schabas, '*Mens rea* and the International Criminal Tribunal for the former Yugoslavia', *New England Law Review* 37, 2002–03, pp. 1015–36.

> By using the word 'committed' in this indictment, the Prosecutor does not intend to suggest that any of the accused physically perpetrated any of the crimes charged, personally. 'Committing' in this indictment refers to participation in a joint criminal enterprise as a co-perpetrator. The purpose of this joint criminal enterprise was, *inter alia,* the expulsion of a substantial portion of the Kosovo Albanian population from the territory of the province of Kosovo in an effort to ensure continued Serbian control over the province. To fulfil this criminal purpose, each of the accused, acting individually or in concert with each other and with others known and unknown, significantly contributed to the joint criminal enterprise using the *de jure* and *de facto* powers available to him.[7]

The indictment then went on to say that the joint criminal enterprise came into existence 'no later than October 1998' and alleged, strangely, that the enterprise included the five named indictees 'and others known and unknown'. (It is not clear why, if the others are known, they were not indicted, nor why the Prosecutor can say she knows there are others if they are unknown.) The indictment then divided the alleged crimes into ones which were 'within the joint criminal enterprise' and ones which were 'foreseeable consequences' of it, alleging that the indictees were liable for acts committed by their subordinates if their acts were foreseeable consequences of the overall plan. Similar changes were made to the indictments for Bosnia and Croatia, where Milošević was also charged with having participated in a joint criminal enterprise to expel non-Serbs.

The timing is key to understanding these changes. On 2 August 2001, the ICTY had found a Bosnian Serb army commander, Radislav Krstić, guilty of genocide. To be more precise, he had been found guilty of having participated in a 'joint criminal enterprise' to commit genocide in Srebrenica in July 1995. Krstić was sentenced to 46 years in prison, the longest sentence that had been issued by the ICTY. This was in

7. Second amended indictment for Kosovo, 29 October 2001, paragraph 16, italics original.

spite of the fact that the Chambers all agreed that Krstić himself had not committed any of the killings. He was said to have participated in the joint criminal enterprise to commit genocide, and was found guilty of sharing the genocidal intent with the actual perpetrators, that is, of having the requisite *mens rea* (guilty mind) to be convicted as a principal perpetrator, on the basis that he knew what was happening, wanted it to happen, and helped it happen. (The Appeals Chamber overturned this ruling on 19 April 2004, finding that Krstić did not have the intent to commit genocide after all, but that he could still be convicted of aiding and abetting it.[8])

Flushed with this success, the Prosecution decided it could obtain a conviction of Milošević for genocide on the same basis. The basic problem for the Prosecution, as it was doubtless coming to realise, was lack of evidence: as David Scheffer, one of the main backers of the ICTY, and a leading opponent of Milošević himself admitted, 'We never had some smoking gun evidence against Milošević.'[9] If the Prosecution was preparing for the eventuality that Milošević's genocidal intent could not be proved, it probably hoped that it could none the less show that genocide was a foreseeable consequence of his other acts and convict him that way. 'Joint criminal enterprise,' it seemed, had become the 'magic bullet' in the Prosecution's armoury.[10]

The problem is that the expression 'joint criminal enterprise' appears nowhere in the ICTY Statute, or indeed anywhere else in international criminal law. The ICTY had to invent it, which they did in the Tadić trial. Like Krstić, Tadić was convicted in 1999 (on appeal) for crimes which the Tribunal could not prove he actually committed. Tadić had formed part

8. Appeals Chamber Judgment, 19 April 2004, paragraphs 82 and 135ff.
9. Speaking at the International Conference on the Trial of Slobodan Milošević, Galway, 29–30 April 2006.
10. Schabas, '*Mens rea* and the International Criminal Tribunal for the former Yugoslavia'.

of a group of soldiers who had entered the village of Jaskići in June 1992; Bosnian Muslims had been killed by the soldiers but no one could provide evidence that Tadić himself had killed them. He was none the less convicted for their murders because it was ruled that he participated in the common plan of ethnically cleansing the village, and that deaths were a foreseeable consequence of this.

As the Appeals Chamber said, 'The question therefore arises whether under international criminal law the Appellant [Tadić] can be held criminally responsible for the killing of the five men from Jaskići even though there is no evidence that he personally killed any of them.'[11] It answered the question in the affirmative by finding that, even though no one saw Tadić fire the shots, people had seen him beat the victims. On the basis that the Secretary-General's report of 3 May 1993 (which helped bring the ICTY into being) had said that the Tribunal should hold individually criminally responsible '*all* persons who *participate* in the planning, preparation or execution of serious violations of international humanitarian law in the former Yugoslavia',[12] the Appeals Chamber concluded that the ICTY Statute, which nowhere talks about 'joint criminal enterprise', but which instead mentions only 'individual criminal responsibility', none the less contained the former doctrine implicitly.

The Appeals Chamber said, 'The Tribunal's Statute does not specify (either expressly or by implication) the objective and subjective elements (*actus reus* and *mens rea*) of this category of collective criminality' [that is, joint criminal enterprise].[13] This is quite true: the Statute clearly states the opposite: 'A person who planned, instigated, ordered, committed or otherwise aided and abetted in the planning, preparation or execution of a crime referred to in Articles 2 to 5 of the present Statute, shall be *individually responsible* for the crime.'[14] Had

11. Tadić Appeals Chamber Judgment, 15 July 1999, paragraph 185.
12. Ibid., paragraph 190.
13. Ibid., paragraph 194.
14. ICTY Statute, Article 7(1).

the Prosecution been able to prove that Tadić had aided and abetted the killings, then there would have been no problem convicting him of that. But in order to achieve the higher level of culpability, equivalent to that of a principal perpetrator, the Appeals Chamber changed the terms of its own Statute, claiming to find in it this new doctrine of 'joint criminal enterprise':

> It is fair to conclude that the Statute does not confine itself to providing for jurisdiction over those persons who plan, instigate, order, physically perpetrate a crime or otherwise aid and abet in its planning, preparation or execution. The Statute does not stop there. It does not exclude those modes of participating in the commission of crimes which occur where several persons having a common purpose embark on criminal activity that is then carried out either jointly or by some members of this plurality of persons. Whoever contributes to the commission of crimes by the group of persons or some members of the group, in execution of a common criminal purpose, may be held to be criminally liable, subject to certain conditions, which are specified below.[15]

No wonder people refer to 'joint criminal enterprise' as an example of 'creative legal theories to enable the prosecution'[16] of complex crimes. Using this new doctrine, the Appeals Chamber overturned Tadić's acquittal at trial and convicted him of the murders of five Muslim men in the absence of any proof that he had actually committed them. Thus was born the concept of 'joint criminal enterprise' (JCE). In 2001, the ICTY used JCE to convict Krstić of its most serious crime: genocide.

The Appeals Chamber based its finding on what it declared to be 'customary international law'. (The ICTY is happy to find things in 'customary international law' when it needs to. By contrast, it never rules this way about 'crimes against peace': even though these are indisputably part of customary

15. *Prosecutor* v. *Duško Tadić*, Appeals Chamber Judgment, 15 July 1999, paragraph 190.
16. Allen O'Rourke, 'Joint Criminal Enterprise and Brdjanin: Misguided Overcorrection', *Harvard International Law Journal*, Vol. 47, No. 1, Winter 2006, p. 315.

international law, it says that it has no jurisdiction over them. More generally, customary international law clearly includes the concept of state sovereignty and the principle of non-interference, outlined in the United Nations Charter and in various UN documents, but the ICTY has never once considered itself an opponent of military intervention; on the contrary, it was allied with NATO during the Kosovo war.)

Bizarrely, the Tribunal based these rulings, inter alia, on two treaties which *had not even existed* at the time the events themselves occurred. It cited in justification of JCE the International Convention for the Suppression of Terrorist Bombing of 1997 and the Statute of the International Criminal Court of 1998.[17] It would be difficult to think of a clearer case of violation of the principle of *nullum crimen sine lege* (there is no crime without a law). For that matter, 'joint criminal enterprise' was not even mentioned in Tadić's indictment (as it had not been mentioned in Krstić's either). To add insult to injury, the ICTY read things into the ICC statute, which are not there, in particular the concepts of 'foreseeability', which are key to the so-called 'third category' of JCE, under which a defendant may be convicted for crimes that are not themselves part of the acts intended by the members of the joint criminal enterprise but which none the less are considered foreseeable consequences of it.[18]

The ICTY explained there were three categories of joint criminal enterprise and, according to the third category, that people can be held criminally liable, as principal perpetrators, for acts which were not intended by the conspiracy into which they allegedly entered, which they did not commit, and which they did not even know about at the time. In the Kvočka Appeals Chamber ruling of 28 February 2005, the ICTY ruled that 'A participant in a joint criminal enterprise need

17. 'Joint Criminal Enterprise in the International Criminal Tribunal for Yugoslavia', Jonathan Widell <www.serbianna.com>.
18. *Tadić* Appeals Chamber Judgment, 15 July 1999, paragraph 220.

not physically participate in any element of any crime',[19] while in a preliminary ruling on the Brdjanin case, the Appeals Chamber reminded everyone that 'The third category of joint criminal enterprise ... [does] not require proof of intent to commit a crime ... .'[20] Yet proof of criminal intent, or *mens rea*, is usually held to be the absolute overriding condition for obtaining a criminal conviction in most jurisdictions. JCE is also used to convict people of acts for which they have no command responsibility: in *Kvočka*, a defendant was acquitted of command responsibility but found guilty of participating in a 'joint criminal enterprise'. The Appeals Chamber ruled, 'Joint criminal enterprise responsibility does not require any showing of superior responsibility, nor the proof of a substantial or significant contribution.'[21] In third-category JCE, one commentator, who supports the concept, observes, 'The accused need not commit any element of the crime under the Statute nor personally witness the intended crime's commission.'[22] This is exactly how Milošević would have been convicted: a seminal Trial Chamber ruling in the Milošević case, dated 16 June 2004, dismissing the *amici curiae's* motion for acquittal, stated specifically with respect to Milošević that 'It is not necessary for the Prosecution to prove that the Accused possessed the required intent for genocide before a conviction can be entered on this basis of liability' [the third category of JCE].[23]

This is a theory of liability which is so contentious that it has been declared unconstitutional in some countries for

19. *Kvočka* Appeals Chamber Judgment, 28 February 2005, paragraph 99.
20. *Prosecutor* v. *Brdjanin*, Appeals Chamber Decision on Interlocutory Appeal, 19 March 2004, paragraph 7.
21. *Kvočka* Appeals Chamber Judgment, 28 February 2005, paragraph 104.
22. O'Rourke, 'Joint Criminal Enterprise and Brdjanin, p. 314.
23. Trial Chamber in *Prosecutor* v. *Slobodan* Milošević, Trial Chamber Decision on Motion for Acquittal, 16 June 2004, paragraph 291.

serious cases such as murder.[24] The absurdity of the doctrine of third-category joint criminal enterprise becomes clear if one takes the case of the Bosnian Serbs. Even if one admits that that army was engaged in the crime of ethnic cleansing, the doctrine of third-category JCE would make every single member of the Bosnian Serb military guilty of all the acts committed by that army, because each member could be said to have shared the joint goals of the group to which he willingly belonged. It is because of the extremely elastic implications of a theory of liability based on the notion that 'all persons who participate' are guilty that even a supporter of the ICTY like Professor William Schabas has ridiculed 'JCE' as standing for 'just convict everyone'.

Matters are only rendered worse by the ICTY ruling that the alleged conspiracy is not a conspiracy at all. In some ICTY rulings the 'common plan' or 'joint criminal enterprise' is defined thus: 'A joint criminal enterprise exists where there is an understanding or arrangement amounting to an agreement between two or more persons that they will commit a crime.'[25] But there are also ICTY judgments which state the opposite: 'There is no necessity for this plan, design or common purpose to have been previously arranged or formulated.'[26] In other words, the so-called 'plan' is in fact not a plan at all. In spite of its highly dubious nature, the concept of 'joint criminal enterprise' is used by the ICTY to obtain convictions for the most serious crimes, including genocide. Following the formulation of JCE in *Tadić* in 1999 and the conviction of Krstić in 2001, the first indictment, which relied explicitly on JCE, was issued on 25 June 2001. Sixty-four per cent of all

24. Schabas, '*Mens rea* and the International Criminal Tribunal for the former Yugoslavia'.
25. *Prosecutor* v. *Milorad Krnojelac*, Trial Chamber Judgment, 15 March 2002, paragraph 80.
26. *Tadić* Appeals Chamber Judgment, 15 July 1999, paragraph 227.

indictments issued between then and 1 January 2004 have relied explicitly on JCE, and Milošević's were among them.[27]

To arrive at the invention of the concept of joint criminal enterprise in *Tadić*, the ICTY Appeals Chamber considered various cases from the later Nuremberg trials, in which small groups of soldiers had collectively committed crimes against prisoners. These cases essentially concerned incidents of mob violence involving a relatively small number of people. But, as Linda Engvall has forcefully argued, there are severe problems with applying such a loose definition of liability in war situations:

> The *mens rea* level of recklessness is far too low for the context of armed conflict. Where people are in a daily fight to save their lives, they will be reckless. Such are not the crimes that the *ratione materiae* of international criminal law should include … When combining an uncertain degree of participation with the lowest possible form of *mens rea* in an extremely flexible, catch-all style mode of liability, the judges of the ICTY and the ICTR have created a trap. Just about anyone in the wrong place, at the wrong time, belonging to the wrong ethnic group, doing what is natural for such a person, can be liable for genocide, regardless that the person had no control of the situation whatsoever.'[28]

These already considerable difficulties are vastly augmented when what is already a vague and fragile doctrine is applied to the kind of huge joint criminal enterprises, spanning many years and a huge area, of which Milošević was accused. JCE, indeed, is the basis on which all the indictments against Milošević were brought. He was accused of participating in three massive 'joint criminal enterprises', which were themselves said to have

27. Allison Marston Danner and Jenny S. Martinez, 'Guilty Associations: Joint Criminal Enterprise, Command Responsibility and the Development of International Criminal Law', *California Law Review*, Vol. 93, 2005, p. 107.
28. 'Extended Joint Criminal Enterprise in International Criminal Law', Masters thesis, Faculty of Law, University of Lund, June 2005, p. 60 <www.jur.lu.se>.

all formed part of 'one transaction', a single plan to expel non-Serbs from territory in order to consolidate Serb control over it. As David Chandler has said, 'If the smoking gun of evidential proof existed to connect Milošević directly to any of the well documented crimes and abuses across the wars of the Yugoslavia's collapse, the indictments on the basis of joint criminal enterprise would have been unnecessary.'[29]

29. David Chandler, 'The Butcher of the Balkans? The Crime of "Joint Criminal Enterprise" and the Milošević Indictments at the International Criminal Tribunal at The Hague', draft expert witness report <www.wmin.ac.uk>.

7
'Greater Serbia'

NOT ONLY IS the doctrine of joint criminal enterprise fraught with difficulty, it was also the direct cause of the trial's effective collapse. Having issued the three indictments at an interval of over two years, the Prosecution then decided that in fact they all belonged together. It applied for the three to be joined into one trial on 11 December 2001, even though the leading Prosecution counsel, Geoffrey Nice, admitted that the indictments had been drawn up separately, at different times and by different people, and even though his office had still not amassed enough material to make its case properly in court on any of the three indictments.[1] (The Croatian and Bosnian indictments were not to be ready for trial until many months into the Kosovo part of the trial, and this disorganisation was to continue for four more years: on the day Milošević died, the Prosecution had still not issued a definitive list of all the witnesses it wanted to call.[2] It also amended the Croatia and Bosnia indictments, respectively in July and April 2004, months after it had concluded presenting its case.)

This application to join three indictments into one monster trial, which was eventually granted, was the reason why the end

1. Trial transcript, 11 December 2001, p. 79.
2. I am grateful to Steven Kay for this information. Geoffrey Nice admitted that the witness list was not complete on 30 October 2003, nearly two years after the trial had started and only a few months before the Prosecution case was due to end. See Trial transcript, 30 October 2003, p. 28364.

of the proceedings was still not in sight when Milošević died in March 2006. The Prosecution argued for joinder on the basis that the disparate events in the three indictments, although greatly separated in time and space, were in fact all part of the same plan or joint criminal enterprise to consolidate Serb power over parts of the former Yugoslavia by expelling non-Serbs from various territories ('ethnic cleansing'). The allegation was not that Yugoslavia had waged a 'dirty war', committing atrocities in the course of what was otherwise a normal civil conflict or counter-insurgency operation, but instead that there was a fully conceived racialist and political plan to consolidate control over territory by expelling non-Serbs.

To demonstrate this, the Prosecution would have had to show both the existence of the plan (the 'joint criminal enterprise') and also Milošević's command and control over the relevant armed groups. For the Croatian indictment, it would have had to show that Milošević controlled the Yugoslav National Army (JNA) whereas in fact, as a mere republican leader (that is, president of Serbia) he had no constitutional power over the armed services of the federation whatever. Many of the Prosecution witnesses called over Croatia testified anyway that the fighting there had been conducted by locals, and that the JNA itself did not play an aggressive role under Belgrade's direction. For the Bosnian indictment, the Prosecution would have to had to rely on acts allegedly committed by the Serb police in Republika Srpska, or to show that Yugoslavia exercised effective control over the army of Republika Srpska in Bosnia-Herzegovina throughout the period 1992–95, even though Republika Srpska had proclaimed itself a separate entity from both Yugoslavia and Bosnia-Herzegovina, with its own army, parliament and president, and even though the authoritative Dutch government report on the Srebrenica massacre, published in April 2002, found no proof to link the massacre with Serb political leaders in Belgrade.[3] For Kosovo,

3. <www.srebrenica.nl>.

the Prosecution would have had to show that there was an ethnic cleansing plan commanded by Milošević and executed by Yugoslav and Serb forces, rather than a series of otherwise unconnected atrocities some of which were committed by Albanians themselves or Serb irregular forces.[4]

In spite of the fact that this Prosecution strategy made a conviction more difficult and a speedy trial impossible, Geoffrey Nice insisted repeatedly that the three indictments had to be joined together because they all revealed Milošević's true intentions:

> The three indictments concern the same transaction, in the sense of a common scheme, strategy or plan, namely the accused Milošević's overall conduct in attempting to create a – in quotation marks – 'Greater Serbia,' a centralised Serbian state encompassing the Serb-populated areas of Croatia and Bosnia and Herzegovina and all of Kosovo. This was to be achieved primarily by forcibly removing non-Serbs from large geographical areas of the territory of the former Yugoslavia through the commission of crimes, in violation of Articles 2 to 5 of the Statute of the Tribunal.[5]

This argument meant that the Prosecution case was political at the deepest level. Milošević, it was alleged, had conceived a political plan, territorial aggression, and that he had done this in the service of a political goal, the consolidation and retention of his own personal power.[6] The shorthand for this alleged plan was 'Greater Serbia'.

It may be that the Prosecution felt that the allegation of unscrupulous power-seeking had some rhetorical value, since it is obviously not a crime. Perhaps the Prosecution calculated that it would have a similar effect to the accusation that Milošević was an extreme nationalist, and that he whipped

4. For accounts of atrocities committed by Albanians against Albanians, see the ICTY indictment of Ramush Haradinaj et al. See also 'US "covered" for Kosovo ally', by Nick Wood, *Observer*, 10 September 2000.
5. Trial transcript, 11 December 2001, p. 72.
6. Ibid., p. 81; cf. Del Ponte's remarks in her opening speech at the beginning of the trial, Trial Chamber, 12 February 2002, p. 9.

up ethnic hatred and thereby started the Balkan wars. This claim is made very frequently, especially in the media, where it is common to find Milošević described as 'a hardline Serb nationalist'. The Prosecution parroted this line, accusing Milošević of commencing his plan in Kosovo in 1989 when 'building on and creating nationalism and extremism' he gained more political power.[7]

The reference to Kosovo in 1989 is to a speech Milošević gave on the occasion of the 600th anniversary of the Battle of Kosovo Field at Gazimestan in that historic Serb province on 28 June 1989 (St Vitus' Day or *Vidovdan*). It has since been elevated by Milošević's enemies, the media and the ICTY Prosecution into one of the key moments in his political career. This is because of a glancing reference he made to 'battles' which the Serbs faced: the Prosecution alleged that the speech was a veiled call to arms. In fact, the speech was the opposite, full of exhortations to peace and to the values of multiculturalism. For instance, Milošević said:

> Serbia has never had only Serbs living in it. Today, more than in the past, members of other peoples and nationalities also live in it. This is not a disadvantage for Serbia. I am truly convinced that it is its advantage. National composition of almost all countries in the world today, particularly developed ones, has also been changing in this direction. Citizens of different nationalities, religions, and races have been living together more and more frequently and more and more successfully.

The other principal piece of evidence for Milošević's so-called nationalism also concerns an event which had occurred in Kosovo two years previously, when he was sent to Kosovo to defuse a political row between Kosovo Albanians and Serbs who were protesting at discrimination against them. There was a rally in the regional capital, Priština, and the police started to rough people up. Milošević came out of the meeting to see what was going on and heard complaints that people were being

7. Trial transcript, 11 December 2001, p. 73.

beaten. 'No one should beat you,' he said and thereby calmed the situation down. (The quotation was misleadingly translated by the BBC subtitles in a famous documentary to read 'No one shall ever dare beat you again', an error which Milošević himself pointed out when *The Death of Yugoslavia* was shown in court for the umpteenth time by the Prosecution.[8] But the BBC's elaborated version was soon quoted as authoritative.[9]) This single and rather innocuous remark has been since elevated into proof of the Serb leader's rabid nationalism: it is often advanced as the moment when he lit the blue touch-paper of war. In fact, it is hardly a blood-curdling cry. Indeed, it is incredible that such an innocent, peaceable and off-the-cuff remark can possibly be construed as an incitement to nationalism. It is to be hoped that future historians will look back on the history of the demonisation of Milošević and try to understand how the edifice of accusation against him was constructed on such flimsy foundations.

These allegations of nationalism persisted even though, throughout Milošević's decade-long political career, none of his very numerous enemies ever once managed to produce a single quotation from him which could be called 'nationalist' or 'extremist'. In any case, 'creating nationalism and extremism' are not crimes under any jurisdiction in the world, still less war crimes. (Were a person to be prosecuted for incitement to violence, the evidence would have to be robust, which the evidence against Milošević was not. It would be far easier to convict numerous Western politicians and journalists of incitement to violence against Serbs than to convict Milošević of this crime.) Had the judges at the ICTY been less hostile to their star defendant and less indulgent towards the Prosecution, they would have stopped the Prosecutors from making these

8. Trial transcript, 9 February 2005, p. 35946.
9. See for instance Chris Stephen's *Judgement Day: the Trial of Slobodan Milošević*, Atlantic Books, London, 2004, p. 45.

political allegations, and declared them to be irrelevant in a war crimes trial.

It was perhaps because it knew that there was no evidence for Milošević's nationalism that the Prosecution was two-faced in its pronouncements on the question. In the Kosovo indictment, it did claim that he 'endorsed a Serbian nationalist agenda' in a speech in Kosovo in 1987, albeit without saying what that agenda was or what was nationalist about it. And Geoffrey Nice did say that Milošević 'fired up emotions, particularly nationalist emotions', although again without elaborating or saying what they were.[10] But, as on many other issues, Nice seemed to want to have it both ways:

> Was the accused [Milošević] a nationalist? Maybe; maybe not. In the same way as he most probably was not in any way a racist … The Prosecution invites caution before finding sincere adoption of a nationalist Serbian cause by this man. [He was] not a racist in the sense of someone determined to live only with fellow Serbs, not an idealist; someone concerned more, if not exclusively, with the maintenance of personal power.[11]

This lack of evidence for the charge of nationalism and racism came to light during the trial itself. When General Philippe Morillon, who had been commander of the United Nations forces in Bosnia in 1992 and 1993, appeared at the trial as a Prosecution witness, he blamed Milošević for having whipped up fears and hatred and thereby unleashing the dogs of war.[12] Milošević asked him, 'Do you have a single example, General Morillon, of my contributing to the sowing of fear or inter-ethnic hatred in the former Yugoslavia, or the government of Serbia, the government of Yugoslavia doing so?'

Judge Robinson evidently felt that Milošević did not know that you should never ask a witness a question without knowing the answer. 'Mr. Milošević,' he said, 'that's a very brave and bold

10. Trial transcript, 12 February 2002, p. 15.
11. Ibid., p. 28.
12. Trial transcript, 12 February 2004, pp. 32036–37.

question. Do you want to put it?' Milošević did. 'Of course,' he replied. 'It's an elementary truth.' Morillon answered:

> Well, I saw the drama beginning after Tito died. We saw all these positions which were being – certainly you were in favour of a Greater Serbia. It may have been patriotism, but it is one of the origins, one of the causes of what happened, of this disease of fear, of fear of being dominated, eliminated. And I think that the misfortunes of Yugoslavia stem from that, but I will not – I won't say any more, anything more about that.[13]

In other words, when asked to provide an example of Milošević's alleged nationalism or incitement to hatred, Morillon could not find a single one. The same thing happened when Peter Galbraith, US ambassador to Croatia from 1993 to 1998, appeared, also as a witness for the Prosecution. Nice asked him, 'Can you in fact identify any particular statement, observation, or anything of the accused that justifies your conclusion or opinion that he was a proponent of ethnic cleansing?' Galbraith replied, 'No. It was a – this was really based on, at least as I recall, it was based on behaviour.'[14]

In spite of this lack of evidence, Greater Serbia formed the central plank of the Prosecution's case. The Greater Serbia theory was also the principal argument of the influential BBC television documentary, *The Death of Yugoslavia*, on which the ICTY Prosecution relied very heavily to make its case, showing the film or parts of it several times during the trial.[15] This gave the impression that the Prosecution case was indeed little more than a rehash in court of opinions gleaned from the television. It was also the basis of the most influential biographies of Milošević, including those by Louis Sell and Adam LeBor, which repeat the usual unsubstantiated allegations that it was Milošević, through his nationalism, who destroyed Yugoslavia from within.

13. Ibid.
14. Trial transcript, 25 June 2003, p. 23082.
15. E.g. on 21 May 2003 during Milan Kučan's testimony, p. 20872; on 9 February 2005 during Mitar Balević's testimony, p. 35977.

According to the theory, Serbia under Milošević destroyed Yugoslavia from within when it strengthened its own power at the federal level in 1990. In that year, following the collapse of the League of Communists in 1989, which had governed Yugoslavia as a one-party state since the Second World War, multi-party elections were held at republican level across Yugoslavia. In some of the Yugoslav republics, the Communists were basically re-elected: this was the case in Slovenia, Serbia and Macedonia. In Croatia, former Communists turned nationalists were elected as the Croatian Democratic Union. In Bosnia, an Islamist, Alija Izetbegović, won the Bosnian Muslim vote.

Under the 1974 constitution, Serbia had two autonomous regions, Kosovo & Metohija and Vojvodina. It is often claimed, including by the ICTY Prosecution, that this constitution gave Kosovo substantial autonomy but such a claim is dangerous nonsense. There is no autonomy of any kind in a one-party dictatorship like Yugoslavia under Tito: one might as well say that the Soviet Socialist Republic of Ukraine had autonomy under Stalin. Following the introduction of multi-party democracy, however, this internal constitutional division of Serbia did become problematic because the two autonomous regions had extensive rights over Serbia at federal and republican level, while it did not have rights over them. The problem, in other words, was identical to the conundrum expressed by the 'West Lothian question' in the United Kingdom: why should Scottish members of the United Kingdom parliament have the right to vote on laws and policies in England when English members of parliament cannot vote on Scottish issues?

Serbia thus reformed its constitution, thereby provoking the claim made in the books and by the ICTY Prosecution that 'Slobodan Milošević revoked the autonomy of Kosovo'[16] and

16. See paragraph 11 of the initial indictment for Kosovo, 24 May 1999, repeated in paragraph 81 of the second amended indictment, 29 October 2001.

thereby started to ride the wave of nationalism. The claim is false. First, it was not Milošević who changed the constitution of Serbia but Serbia's parliament. Second, the autonomy of Kosovo was not revoked: Kosovo & Metohija remained an autonomous province within Serbia, albeit with some reduced powers. In any case, changing the constitution of a state cannot conceivably be considered the rightful subject of a criminal prosecution for war crimes by an international tribunal. To say that the national autonomy of ethnic Albanian citizens of Yugoslavia is a matter for international criminal law to deal with is absurd: whether the cause is right or wrong, the constitutional arrangements of a state are political matters, best decided by the people themselves. Yet these matters did form a key part of the Prosecution case against Milošević, and they were the subject of much evidence given by Prosecution witnesses.[17] For instance, when he appeared as a witness for the Prosecution, the president of Croatia, Stjepan Mesić, said, 'I'm quite certain that Milošević didn't favour any kind of Yugoslavia that would be either federal or confederal. That was not what he wanted. What he was interested in was a Greater Serbia which would be created upon the ruins of the former Yugoslavia.'[18]

These changes in the constitutional arrangements in 1990 coincided with political changes in the leadership of the provinces, which meant that those provinces were henceforth represented at the federal level by allies of the president of Serbia. This in turn encouraged secessionist desires in Slovenia and Croatia. They wanted a loosening of the federation, while Serbia wanted a tightening of it, including through democratic multi-party elections at federal level. Slobodan Milošević campaigned for these, while the secessionist states (especially Slovenia) campaigned against them: democracy at the federal

17. See for instance that given by the former president of Slovenia, Milan Kučan, on 21 May 2003.
18. Trial transcript, 1 October 2002, p. 10522.

level would have represented a centralising force. These differences of opinion were exacerbated by arguments over the state budget and the national debt, comparable to those which bedevil relations between northern and southern Italy. The situation was especially aggravated by the desire of the unpopular federal prime minister, the Croat Ante Marković, to launch 'the most radical reform in Eastern Europe',[19] for which he enjoyed the backing of the United States and the World Bank but not the support of the Yugoslav electorate. Eventually these differences proved irreconcilable and they led to hysterical over-reaction on all sides and war.

No doubt Milošević bears some political responsibility for what happened, although even his enemies concede that it was thanks to him that the fighting was stopped in Slovenia, the Yugoslav National Army having been ordered to fight by Ante Marković.[20] But rearranging an internal constitution is absolutely not a war crime, nor any business of the international community, any more than it would be if the United Kingdom decided to impose a national curriculum on Scotland.

The Prosecution none the less based the whole of its case on the political allegation that Milošević wanted to destroy Yugoslavia and carve a Greater Serbia out of it instead. Bizarrely, it did this even though Greater Serbia had not even been mentioned in the indictments. Greater Serbia was mentioned nowhere in the Kosovo indictment; in the Bosnia indictment, it was mentioned only glancingly ('Slobodan Milošević's calls for the union of all Serbs in one state coincided with those agitating for the creation of a "Greater Serbia."'[21]); while in the Croatia indictment it was mentioned only in connection with Vojislav Šešelj and not at all in connection with Milošević himself. The fact that the Prosecution applied for the three

19. Warren Zimmerman, *Origins of a Catastrophe*, Times Books, Random House, New York, 1999, caption to his photograph of Marković in the centre of the book (no page number).
20. Zimmerman, *Origins of a Catastrophe*, pp. 143 and 145.
21. Bosnia indictment, paragraph 103.

indictments to be joined into one on the basis of a master plan which none of them had even mentioned caused considerable confusion, even among the ICTY judges.

As with the allegation of nationalism, however, the Prosecution seemed both to claim and not to claim that Milošević was an adherent of the doctrine of Greater Serbia. In its pre-trial brief for Kosovo, it claimed that 'Greater Serbia' was 'Milošević's vision': 'The accused had already demonstrated in Croatia and Bosnia and Herzegovina that he was prepared to go to war to achieve his vision of the Greater Serbia.'[22] Moreover, in the Prosecution's motion for joinder there were plenty of references to 'Greater Serbia', for example, 'In the present case the three indictments concern the same transaction in the sense of a common scheme, strategy, or plan, namely the accused Milošević's overall conduct in attempting to create a "Greater Serbia" – a centralised Serbian state encompassing the Serb populated areas of Croatia and Bosnia and Herzegovina and all of Kosovo.'[23]

In the hearing on joinder held on 11 December 2001, Geoffrey Nice replied 'That's correct' when Judge May put it to him that 'You speak in your motion of a plan to establish a Greater Serbia. That's the scheme or strategy which you rely on in this motion, as I understand it. You will correct me if I am wrong.'

On the other hand, Nice also said that 'Greater Serbia' was a misleading expression but only because Kosovo had always been part of Serbia: consolidating control over it would therefore not have made Serbia greater.[24] He also hedged around his use of the term on numerous occasions.[25]

22. Kosovo pre-trial brief, page 9, paragraph 23, quoted by Geoffrey Nice on 11 December 2001, transcript p. 142. (The trial briefs are generally not available on the ICTY website.)
23. Prosecution's motion for joinder, 27 November 2001, paragraph 13 (quoted by Judge Robinson on 25 August 2005, p. 43246).
24. Trial transcript, 11 December 2001, p. 81.
25. E.g. Ibid., p. 74.

No doubt 'Greater Serbia' had rhetorical value in implying that Serbia under Milošević had pursued a policy of territorial aggression against other countries. Perhaps it recalled the Nazi project of creating *Großdeutschland,* adding further to the illusion that the Milošević trial was somehow the inheritor of Nuremberg. Certainly, territorial aggression was often alleged by Milošević's enemies. For instance, during the Kosovo war, US National Security Adviser Sandy Berger wrote to US Senate Majority Leader Trent Lott, justifying NATO's own aggression against Yugoslavia, saying that, 'Serbian [sic] President Milošević initiated an aggressive war against the independent nation of Croatia in 1991 [and] against the independent nation of Bosnia-Herzegovina in 1992.'[26] Kosovo, Berger argued, was merely the continuation of the same kind of aggressive policy. But the accusation of aggressive war against two 'independent' states was difficult to sustain. In spite of the ICTY's rulings that the Croatian and Bosnian wars were 'international', it is obvious that the wars of 1991 and 1992 were classic civil wars within Yugoslavia (and, later, within Bosnia-Herzegovina). It is absurd to say that Yugoslavia had attacked Croatia or Bosnia, when in fact the latter were seceding from the former. The Yugoslav army was on the territory of a disintegrating state; it therefore cannot be said to have attacked another state. This fact was itself reflected in the Croatia indictment of Milošević which stated that 'the Socialist Federal Republic of Yugoslavia [SFRY] existed as a sovereign state until 27th April 1992.'[27] But if the old Yugoslavia was still a subject of international law until then, the war in Croatia, which was part of the SFRY in 1991, cannot have been international. In any case, and more importantly, the ICTY had declared (with respect to the suggestion that it indict NATO states for the

26. Letter from Sandy Berger to Senate Majority Leader, Trent Lott, 23 March, 1999, quoted in 'Not-So-Sacred Borders (Sovereign states can no longer expect frontiers to be inviolate)' by James Kitfield, *National Journal*, 20 November 1999.
27. First amended Croatia indictment, 23 October 2002, paragraph 110.

1999 attack on Yugoslavia) that it had no jurisdiction over crimes against peace. It was therefore entirely wrong for the Prosecutor to use the 'Greater Serbia' charge to imply that Milošević was guilty of the crime of aggression, because the ICTY judges have said that this is not a crime over which they have jurisdiction.

More generally, the Serbs in Croatia and Bosnia claimed that if Croats and Bosnian Muslims demanded the right to secede from Yugoslavia, then Serbs living in Croatia and Bosnia had the right to secede from those two new states and to remain in Yugoslavia. This Yugoslav position was explained by Ratko Marković in his testimony for the defence during the Milošević trial, when he explained that, constitutionally speaking, Yugoslavia was not a federation of republics or a community of states but 'a federal state of the peoples of Yugoslavia': the peoples were the constituent elements, not the republics.[28] Ultimately this was the fundamental bone of contention between the Serbs, on the one hand, and the Croats and the Bosnians on the other during the break-up of Yugoslavia: the Serbs wanted to retain the status of 'constituent people' even in a sovereign Croatia, while the Croats wanted them to be a national minority. A similar point was made during testimony by career diplomat Vladislav Jovanović, who explained that the official view was taken before the conflict that unilateral declarations of independence were unjustified: 'Only the peoples of Yugoslavia … by way of referendum can decide whether their joint state can continue to exist.'[29] The confusion over whether aggressive war was really a hidden part of the indictment was only exacerbated by the fact that the Prosecution counsel, Geoffrey Nice, said in his opening speech at the Milošević trial that it was the Croats who started attacking the Serbs in the spring of 1990, that is,

28. Trial transcript, 18 January 2005, p. 35144.
29. Trial transcript, 14 February 2005, p. 36097.

before Croatia's declaration of independence, and that they had therefore started the war.[30]

Perhaps the Prosecution used the 'Greater Serbia' accusation for jurisdictional reasons. The Prosecution needed to show that the expulsions known as 'ethnic cleansing' were in fact an example of systematic persecution, or else they would not have qualified as crimes against humanity. It was to trigger this specific charge that Nice used the language of international criminal law when he said that the offences had been 'committed as part of a *widespread or systematic* attack against the civilian population': if an attack against a civilian cannot be shown to be widespread or systematic, then it does not qualify as a crime against humanity.

In fact, the real reason for the 'Greater Serbia' accusation, and the motion to join the three indictments into one trial, slipped out almost by accident during exchanges between Judge May and Geoffrey Nice at the hearing of 11 December 2001. When Judge May suggested that the Bosnia and Croatia indictments be tried together but separately from the Kosovo indictment, Nice explained why joinder was necessary. His English was mangled but the meaning was clear:

> Finally, the Chamber will appreciate that although we don't know what, if any, defence the accused may advance, there is an entirely discrete issue in relation to Kosovo to do with the NATO bombings which may occupy a great deal of time when it comes about. Now, the counter to that – and this is a general argument that we cannot press too strongly – the counter to all that is that what was happening in Kosovo, however engineered and manipulated, to whatever extent the accused may have relied on circumstances that fell into his lap when they did, circumstances that arose to his advantage – I can't use a metaphor as bad as that when they did – and this can only be explained by seeing his conduct from the end of the 1980s right the way through to 1999 as a whole so that – and that this argument is both positive, in that it supports the application for joinder, and significant, in that it goes to show

30. Trial transcript, 12 February 2002, pp. 30–1.

> how the evidence would become significant, in any event, if Kosovo started first, and then we'd all be in a difficulty.[31]

What Nice meant was that the Prosecution was determined to join the three trials into one in order to distract attention from the NATO bombing. Had Kosovo been tried on its own, Milošević would have emphasised it, as indeed he did during that part of the trial. His defence was a combination of *tu quoque* and not guilty: he said that NATO's bombs had caused the mass flight of refugees, and that it had killed hundreds of innocent civilians. If ICTY convictions could be obtained on the basis of third-category joint criminal enterprise – that is, that people could be held criminally responsible for acts which were reasonably foreseeable consequences of their decisions even if not specifically intended by them – then his *tu quoque* defence would have been very strong: how could NATO be exonerated for the civilian deaths which it had caused, if Milošević could be convicted for the same thing? Joinder of the three trials into one was essential, the Prosecution argued, precisely because it wanted to claim that the 'joint criminal enterprise' of creating a Greater Serbia had in fact started with Milošević's 'nationalist' speeches in 1987 and 1989, and the constitutional changes of 1990, and that, by implication, NATO's intervention was a natural response to a decade of aggression. This was simply a juridical version of Sandy Berger's argument, quoted above. In other words, Nice's own words amount to an admission that the original Kosovo indictment – the actual cause of Milošević's transfer to The Hague – could not stand up in court on its own and needed to be bolstered by arguments about Croatia and Bosnia.

Milošević himself said as much. He said it was nonsense to allege that there had been a plan to create a Greater Serbia and that the reason the Prosecution wanted to join the indictments together was 11 September 2001: the powers which attacked Yugoslavia in 1999 had used 'the Bin Laden organisation'

31. Trial transcript, 11 December 2001, p. 92.

to further the campaign of Kosovo Albanian separatism. He said that joinder was being sought to protect those who had attacked Yugoslavia and to obscure their crimes. He said that on 28 April 1992 the Federal Republic of Yugoslavia had been created (following the secession from old Yugoslavia of Slovenia, Croatia, Bosnia-Herzegovina and Macedonia) and that the new Yugoslav state had solemnly declared that it had no territorial pretensions on other states. He also said that Serbia had accepted the Vance-Owen plan in May 1993, which implied accepting Bosnia & Herzegovina as an independent state.

Milošević said that there had never been any ethnic persecution in Serbia at any time while he was in charge of the republic, that Serbia was the only Yugoslav republic whose ethnic composition had not changed during the wars (that is, which had not expelled any of its minorities), and that the government of Kosovo & Metohija had always been multi-ethnic. He of course denied there had ever been any plan to expel the Albanians. He emphasised that Albanian terrorists had killed more Albanians than Serbs by 1998. To emphasise his claim that Serbia under his leadership had always been ethnically tolerant, he said that 70,000 Muslims had sought refuge in Serbia during the Bosnian civil war.[32] In a reference to the demand made at Rambouillet that NATO have the right to occupy the whole of Yugoslavia, Milošević said that the NATO bombing could be understood only 'as an expression of fury and revenge for the fiasco that NATO experienced in its attempt to impose military occupation of Yugoslavia'. He repeated what he saw as the real reason for introducing the new indictments: 'They simply wish to push into the background Kosovo only because it raises the issue of cooperation with terrorists and it is not suited to current policies.'[33]

32. Trial transcript, 11 December 2001, p. 137.
33. Ibid., p. 140.

The Trial Chamber ruled that the Croatia and Bosnia indictments would be joined, but that Kosovo would be tried separately and first.[34] However, the Prosecution appealed against this on 15 January 2002. An oral hearing took place on 30 January 2002, at which Carla Del Ponte repeated the claim that the three indictments belonged together. She repeated the Prosecution's central claim that all three wars were part of 'the same transaction; one strategy, one plan, one scheme'.[35] Milošević made a strong intervention at this point. He said, 'By adding up three lies, you will not get the truth. You will simply enlarge the lie itself.'[36] He went on:

> You have spoken here about three linked issues, but authors of that so-called plan are so certain of it that it took them ten years to bring indictments for Croatia and Bosnia. These indictments are absurd. They're nonsensical because Serbian politics, Serbia, and I myself were involved in creating peace in Bosnia and Croatia. We were not involved in making war, and we used all of our influence in order to achieve peace as soon as possible.[37]

Milošević said that in fact the boot was on the other foot: he accused Croatia of specifically wanting a war in order to expel Serbs from Croatia.[38] Milošević recalled that he had travelled to Pale, the Bosnian Serb capital, to visit the Bosnian Serbs together with Constantine Mitsotakis, the Greek prime minister, in 1993 to get them to accept the Vance-Owen plan, but that their Assembly had rejected it. Yugoslavia had then introduced a blockade on the Bosnian Serbs to force them to accept the plan. (Indeed, when Milošević died, the president of the Bosnian Serb Republic (Republika Srpska), Dragan Čavić, who refused to attend the funeral, said that he could 'never forgive Milošević' for having imposed the embargo

34. Ibid., p. 145.
35. Trial transcript, Appeals Chamber, 30 January 2002, p. 293.
36. Trial transcript, 30 January 2002, p. 337.
37. Ibid., p. 337.
38. Ibid., p. 338.

on the Bosnian Serbs during the Bosnian civil war. So much for an alliance between the Bosnian Serbs and Serbia or Yugoslavia.)[39]

Milošević insisted that the real 'plan' was 'to put the Balkans under somebody else's control'.[40] He said that he had reached various agreements with Albanian Prime Minister Fatos Nano in 1997, but that the powers keen to establish control over Yugoslavia had not wanted a peaceful resolution of the conflict in Kosovo. He said that after his meeting with Nano, a letter arrived from Klaus Kinkel and Hubert Védrine, the German and French foreign ministers, saying that they were concerned about the situation in Kosovo:

> Ten years had passed in the meantime. Ten years had passed from the time when you claim that Serbia had taken control over its own territory. There were no murders during that time, nor robberies, nor arson, nor arrest, nor torture in Kosovo. We didn't have a single political prisoner in Yugoslavia. Not a single one. 20 Albanian newspapers were published.[41]

This, in essence, was to remain Milošević's defence during the whole trial. There had been no ethnic persecution in Kosovo, while his action as president of Serbia had been to promote peace in the neighbouring states of Croatia and Bosnia-Herzegovina.

On 1 February 2002, the Appeals Chamber decided to overturn the Trial Chamber's decision and grant the Prosecution's request to join the three indictments into one trial. Kosovo was to be tried first, Croatia and Bosnia later. The integrated single trial then started on 12 February 2002.

The Appeals Chamber outlined in full its reasons for the decision on joinder in a written Reasons for Decision published on 18 April 2002. The argument turned mainly

39. 'Bosnian Serb Pres Says Won't Attend Milošević's Funeral', *Associated Press*, 15 March 2006.
40. Trial transcript, 30 January 2002, p. 341.
41. Ibid., p. 342.

on whether different crimes or different indictments could indeed be considered part of a single 'transaction', and on the correct interpretation of that term as it figures in the French and English texts of the ICTY's rule book. But the Appeals Chamber also ruled that the defendant's state of mind – that is, the *mens rea* considerations discussed in the previous chapter – was crucial to the Prosecution case and that this in turn was based on the allegation that he had had 'a strategy or plan to create a "Greater Serbia"'.[42] The Appeals Chamber put the onus on the Prosecution to prevent the trial from getting out of hand: 'The prosecution will bear *a heavy responsibility* to ensure that the single trial which it wanted does not become unmanageable by overloading the Trial Chamber and the Defence with unnecessary material.'[43] It said that it had powers to enforce this if necessary.[44]

These instructions were ignored. On 31 October 2001, during a pre-trial hearing, the judges asked the Chief Prosecutor how long she would need to make her case. The answer was 500 days or three years.[45] On 11 December 2001, Judge May told Geoffrey Nice that this was too long. He returned to the matter on 10 April 2002, that is, after the Appeals Chamber had ruled in favour of joinder, and ruled that the Prosecution should have 'one year from today to conclude their case. That will give them a total of 14 months in which to finish the case. *In the view of the Trial Chamber, no Prosecution case should continue for a period longer than that*.'[46] As it turned out, the Prosecution case continued for nearly twice as long. The first Prosecution witness was heard on 18 February 2002 and the last on 12 February 2004. On 25 July 2002, the Trial

42. Appeals Chamber, Reasons for Decision on Prosecution Interlocutory Appeal from Refusal to Order Joinder, Decision of 18 April 2002, paragraph 8.
43. Ibid., paragraph 25, emphasis added.
44. Ibid., paragraphs 22–26.
45. Trial transcript, 30 October 2001, p. 53
46. Trial Chamber, 10 April 2002, p. 2784. Emphasis added.

Chamber gave the Prosecution until 16 May 2003 to complete its case and 'limited' the number of Prosecution witnesses to 177, but when the Trial Chamber reconsidered the matter on 20 May 2003, following an application by the Prosecution to call a further 118 witnesses, it made a new deadline of a hundred days from 16 May 2003.[47] Even this new deadline was missed and the Prosecution case dragged on for nearly another year. Right up until the very end of the Prosecution case, the Prosecution was applying to call further witnesses.[48] Accusations bandied about that Milošević himself was guilty of delaying the trial, or spinning things out, do not stand up in the light of these facts.

When the unified trial finally did open on 12 February 2002, Geoffrey Nice repeated the accusation that Yugoslav forces had sought to capture parts of Croatian and later Bosnian territory with the goal of attaching them to Yugoslavia: 'The accused shared with Jović his view that the amputation of Croatia, the secession of Croatia, was to be exercised in such a way that various *opštinas*/regions of Croatia remain with us, with Yugoslavia.'[49]

Nice said that Milošević wanted parts of Croatia to remain within Yugoslavia, and he described this as 'a seemingly innocent goal but one that could be used to explain and to justify territorial aggression and crimes against humanity in the coming years'.[50] The next day, he repeated the charge:

> It wasn't a case simply of seeking to establish independence [of Serb parts of Croatia from Croatia], it was absolutely a case of seeking to be joined to something else; namely, to Serbia … These regions [Serb regions] in both states, Croatia and Bosnia, declaring their autonomy or independence, weren't just doing it for themselves. They were doing it in order to be joined to something else. Was it

47. Trial transcript, 20 May 2003, p. 20750.
48. Trial transcript, 22 January 2004, p. 31399. See also Trial transcript, 30 October 2003, p. 28364.
49. Trial transcript, 12 February 2002, p. 23.
50. Ibid., p. 24.

> purely fortuitous that they wanted to be joined to something that was going to be headed by this accused, or was he, as we say, for all the reasons already advanced, a party to precisely that plan? The facts I have just summarised, of course, indicate powerfully that of course he was a party to that plan.[51]

In other words, Geoffrey Nice did imply that territorial aggression was indeed part of the indictment. Nice also said that the Yugoslav army shared Milošević's programme and he specifically called it 'Greater Serbia'.[52] But Nice also referred to the 'Greater Serbia' plan in connection with Vojislav Šešelj:

> The creed openly espoused by the man Šešelj went by the title of 'Greater Serbia.' It's a phrase that is bound to be heard in this court. We will not ourselves encourage its excessive use for fear that our shorthand may lead to a brevity of thinking. We don't particularly associate it as a title with the approach of the accused whose purposes we have already separately described. That he might rely on the support of people who had perhaps extreme nationalist views going by particular titles is, again for reasons already given, not surprising.[53]

In other words, Nice said he did not 'particularly' associate 'Greater Serbia' with Milošević, having earlier insisted that it was the central fact about the accusations against him. He also said that the charge of genocide, brought in the Bosnia indictment, flowed from the overall 'plan': 'That genocide was the natural and foreseeable consequence of the joint criminal enterprise forcibly and permanently to remove non-Serbs from the territory under control.'[54] This indicated that Nice was preparing the ground for a headline conviction for genocide on the basis of 'third-category' joint criminal enterprise.

During the course of the rest of the prosecution case, references to Greater Serbia cropped up frequently. It was the focus of attention when Kosta Mihailović, the author of the

51. Trial transcript, 13 February 2002, pp. 115–17.
52. Trial transcript 12 February 2002, p. 82.
53. Ibid., p. 50.
54. Ibid., p. 92.

famous memorandum of the Serbian Academy of Sciences, testified as a Defence witness on 17 December 2004, and when Mihailo Marković, the noted philosopher and political scientist, testified on 16 and 17 November 2004, also for the Defence: the Prosecution alleged that the touch-paper of Serbian nationalism had been lit by the memorandum written by the Serb Academy and leaked in 1986. Many wild claims have been made about this memorandum, in particular that it was at the origin of the plans to create a Greater Serbia:[55] in fact, it does not even mention the term.

Nice also tried to associate Milošević with 'Greater Serbia' on the basis of a tapped phone conversation between him and Radovan Karadžić, during which there had been a reference to the London agreement of 26 April 1915 which involved a map showing an enlarged Serbia.[56] Nice tried to show that territorial aggrandisement had been at the centre of Milošević's plan by introducing a Chetnik map from the Second World War as evidence;[57] he then introduced a map published in a magazine called *Epoha*, published by the Socialist Party of Serbia, and said that Milošević's plan for the territorial aggrandisement of Serbia was evidenced by it. (Mihailović comprehensively denied that the map was ever part of the Socialist Party of Serbia's plan, and showed that it was simply a map of Yugoslavia without Croatia or Slovenia in it.[58] Milošević later accused Nice of falsifying the evidence.)

It was therefore a matter of considerable astonishment when the whole allegation of 'Greater Serbia' seemed to unravel during the testimony given by Vojislav Šešelj in August 2005, more than three years after the trial had started. On 25 August 2005, after a long and protracted argument about the meaning of 'Greater Serbia', Geoffrey Nice was forced

55. See for instance Stephen, *Judgement Day*, p. 43.
56. Trial transcript, 17 November 2004, p. 33547.
57. Ibid., p. 33549.
58. Ibid., p. 33553.

to admit that Milošević had actually 'never used the words Greater Serbia himself'.[59]

There was shock and ridicule across the courtroom. Judge Robinson recalled in disbelief that Greater Serbia had been the main basis on which the three indictments had been joined into one trial three years previously. Nice got into an awful mess at this point: 'What we allege against the accused is that he cleaved to – for his own purposes maybe – a plan to have all Serbs living in one state. That creates a de facto Greater Serbia because the western boundaries, Virovitica-Karlobag line are all the same. But are we saying that he is a proponent personally of an historical Greater Serbia concept? We haven't said that.'[60]

In fact, of course, the Prosecution had alleged this, in the Kosovo pre-trial brief and in the hearings on joinder. Steven Kay reminded him that he had specifically said the army supported Milošević's alleged plan of creating a Greater Serbia on 12 February 2002.[61]

Milošević interjected at this point, saying that Geoffrey Nice was trying to have it both ways.[62] He said that the Prosecution was trying to use the argument that all Serbs should live in one state, Yugoslavia, in support of an accusation that he, Milošević, somehow conspired to destroy that same Yugoslavia and replace it instead with a Greater Serbia. Judge Robinson intervened to quote various witnesses called by the Prosecution who had claimed that Milošević did support Greater Serbia.[63] He read out quotes from the Prosecution's response to the motion for judgement of acquittal, discussed in 2004, in which the Prosecution had repeatedly used the term 'Greater Serbia' with reference to Milošević: in paragraph 262, the Prosecution had written, 'This amounted *de facto* to planning for a Greater

59. Trial transcript, 25 August 2005, p. 43218.
60. Ibid., p. 43225.
61. Ibid.
62. Ibid., p. 43229.
63. Ibid., p. 43233.

Serbia', and in paragraph 273, 'The self-determination of the Serbian people would include the territories with Serb majorities in Croatia and Bosnia & Herzegovina, achieving a *de facto* Greater Serbia a term he avoided using in public or at all.' In paragraph 276, the Prosecution had argued, 'More generally, witnesses were clear that the accused wanted to create a Greater Serbia.'[64]

Judge Kwon leapt in and quoted more of the Prosecution's statements that Milošević's goal was to create a Greater Serbia, while Judge Robinson said that it had always been a central plank of the Prosecution's case.[65] Nobody could understand why on earth Nice was now trying to say that the Prosecution did not associate Milošević with Greater Serbia. Nice tried to retrieve his position by quoting from the Prosecution's brief for the appeal against the Trial Chamber's decision not to allow joinder (a brief dated 15 January 2002), claiming that they showed that he had never used the term 'Greater Serbia' except under careful conditions, and that he had always claimed that Milošević wanted a centralised Serb state without non-Serbs in it.[66] Astonishingly, Nice then said that this plan was different from 'Greater Serbia', whereas on countless previous occasions he had said that it was a synonym for it: he started to say that 'Greater Serbia' was a 'historically based' concept and different from the one Milošević was said to espouse:[67]

> Judge Bonomy: Do you say then – do you say that Greater Serbia as you understand it is something different from all Serbs living within the same state?
>
> Mr Nice: Indeed. The plan – because it has a different historical root.[68]

The judges went back and forth with Nice, and Nice repeated that Milošević wanted a centralised Serb state to be carved out

64. Ibid., pp. 43241–43.
65. Ibid., pp. 43245–46.
66. Ibid., p. 43250.
67. Ibid., p. 43251.
68. Ibid., p. 43254.

of territories in Croatia and Bosnia, that is, for the Serbian parts of those countries to be annexed to Serbia thereby increasing the territory of the Serbian state.[69] But if such a plan had existed, why would Nice suddenly baulk at calling it 'Greater Serbia'? Nice then confirmed that he was arguing that Milošević wanted an enlarged Serbian state, but that Šešelj's historical 'Greater Serbia' concept included the whole of Bosnia which he admitted Milošević did not want.[70] In other words, Milošević was said to be both allied with Šešelj on 'Greater Serbia' and also at odds with him on it.

In *Alice in Wonderland*, the Queen of Hearts shouts, 'Sentence first! Verdict afterwards!' But at least the Knave of Hearts knew what he was being accused of.

69. Ibid., pp. 43255–58.
70. Ibid., pp. 43260–65.

8
Witnesses for the Prosecution

BECAUSE OF THE political nature of the Prosecution case, the Prosecution tried to use the procedures of criminal justice to paint an overall picture of ten years of Yugoslav politics and wars. The strategy was similar to that adopted in the Prosecution of the Bosnian Croat politician, Dario Kordić, which was also led by Geoffrey Nice. Rather than trying to focus the Prosecution on specific proofs of guilt, Nice tried, in both cases, a 'scatter-gun approach' which he justified by saying that it was necessary to paint an overall picture of all the relevant events in order to establish criminal liability.

The scope of the Prosecution case was therefore massive. In spite of instructions not to do so, the Prosecution flooded the Tribunal with far more material than any individual could ever have read. On one occasion, indeed, the Prosecution admitted that it had not kept track of what it was submitting as evidence. On 25 November 2002, the Prosecution tendered documents as evidence and one of the judges asked several questions about them, including what exactly were these documents. The Prosecuting counsel, Mrs Uertz-Retzlaff, had to admit that she did not know the answer.[1]

The situation was made even worse by the widespread use of 'expert witnesses'. This is common practice at the ICTY and is a gigantic waste of time. Expert witnesses are people

1. 'The other questions I can't actually answer.' Trial transcript, 25 November 2002, p. 13411.

who claim to have expertise on a subject, but who in fact have not witnessed anything. Their 'evidence' therefore has no probative value at all. Expert witnesses are generally used in the ICTY to provide opinion or political background to what are fundamentally political charges. The format of cross-examination is blatantly abused in such hearings: whereas the true purpose of cross-examination is to find out whether witnesses are telling the truth – whether their account is coherent and plausible, and what is their manner and demeanour while they give it – with expert witnesses the cross-examination process is simply a format which enables them to say what they think. The questions are not forensic questions at all, but prompts.

There were many such witnesses at the Milošević trial, very often expert witnesses who were not even really experts. Audrey Budding, for instance, who had written a thesis on Serb nationalism and who appeared as a witness for the Prosecution, had also worked at the US embassy in Belgrade; Robert Donia, who testified for the Prosecution about Bosnia, had been a consultant for the US military. On other occasions, the Prosecution cross-examined itself when it called its own employees as witnesses: Graham Blewitt and Ewa Tabeau, who testified as experts, were in fact employees of the Office of the Prosecutor and not outside experts at all.

The quality of the 'expertise' was concomitantly low. Ewa Tabeau testified about refugees, but admitted airily that she 'did not use the legal definition [of refugee]' when compiling her assessment of the number of refugees from Bosnia-Herzegovina. This is in spite of the fact that there is a very clear legal definition of refugees in the UN Convention relating to the Status of Refugees of 1951. Ms Tabeau disregarded the key requirement, that a refugee must fear persecution, in order to count among her figures for 'refugees' from Bosnia people who had left the country to go to work abroad.[2]

2. Trial transcript, 7 October 2003, p. 27176 and p. 27179.

Many of the expert witnesses had worked with the Prosecutor's office. Andras Riedlmayer appeared as a witness on the destruction of cultural heritage: although there has been huge destruction of churches in Kosovo, and in spite of the fact that traditional Ottoman mosques in Bosnia have been destroyed and/or replaced by Wahhabi ones thanks to the huge influx of Saudi money in the years since the end of the war, Riedlmayer concentrated largely on the alleged destruction of Muslim cultural monuments by Serbs. He was asked by Slobodan Milošević during cross-examination whether he had received instructions from any institutions, including from the Tribunal, before preparing his report on Kosovo, and replied that he had not: 'We did not perform the study in order to support any particular indictment.'[3] Oddly enough, even though Riedlmayer was giving evidence under oath, he had in fact written precisely the opposite of this in 2000. At that time, he had said that one goal of his survey was 'to collect documentation to support the investigations of the Office of the Prosecutor of the U.N. war crimes tribunal (ICTY), which has included the destruction of cultural and religious heritage in Kosova among the charges in its war crimes indictment of Yugoslav President Slobodan Milošević and other officials.'[4]

Very often, the testimony of 'expert' witnesses had no probative value whatever. Ton Zwaan was called as a witness for the Prosecution to testify about the meaning of 'genocide' but his 'report' specifically exclued all reference to Bosnia. In other words, his 'evidence' had nothing to do with the criminal accusations against Milošević at all.[5] Zwaan's 'expertise' turned out to be something of a veneer: he admitted under cross-examination that he had no expertise in the law governing genocide (which he barely mentioned in his report) or indeed

3. Trial transcript, 9 April 2002, p. 2660, emphasis added.
4. 'Libraries and archives in Kosova: a post-war report', by Andras Riedlmayer, *Bosnia Report*, New Series No. 13/14, December 1999–February 2000 <www.bosnia.org.uk>.
5. Trial transcript, 20 January 2004, pp. 31160ff.

in law at all, while the Center for Holocaust and Genocide Studies for which he worked was a mere four months old at the time, and had only ever produced one report – the one commissioned by the Office of the Prosecutor.[6]

The Prosecution made widespread use of the ICTY's Rule 92*bis*, which allows witnesses to submit written statements, and for these statements to be presented as evidence to the court. (The provisions go together with those laid out in Rule 89 (f), which allows for evidence to be produced orally or in writing.) The consequence is that statements can be admitted as evidence without the witness appearing for cross-examination. Applications to submit evidence under Rule 92*bis* were made on no fewer than 28 times by the Prosecution during the Milošević trial and Milošević protested strongly against this practice.

Milošević protested because several witnesses had appeared for the Prosecution who seemed not to have written their own witness statements, and who complained that the statements, written in English, a language they did not understand, did not correspond to what they had said.[7] On 11 November 2002, for instance, during cross-examination, Milošević quoted to Mustafa Čavić, a witness for the Prosecution, something in his witness statement. Čavić replied, 'Well, I don't know who wrote this', and insisted that the information was false. Milošević commented, 'All right. Very well. Thank you. I'm not going to ask you any more about that because you say yourself that you don't know who wrote your statement.'[8]

Similarly, on 23 July 2003, anonymous witness B-83, whose testimony was punctuated by numerous closed sessions to protect his identity, protested vigorously at what he claimed was the Prosecution tampering with his written statement. Milošević drew attention to the fact that nearly all of the

6. Trial transcript, 21 January 2004, p. 31187.
7. This happened with anonymous witness B-1098 who testified on 3 June 2003; see Trial transcript, p. 21545.
8. Trial transcript, 11 November 2002, p. 12798.

statement was covered in the witness' hand-written corrections. Milošević asked whether it was true that nearly all the written statement was wrong. The witness replied, 'That's right … It is my conviction that I didn't say that in that way … I say quite plainly that there are errors of such a nature that I couldn't under any circumstances sign such a statement … .'[9]

On one occasion, when Milošević protested vehemently at this practice, Judge May freely admitted that 'A great number of the statements are not written by the witnesses themselves. They're taken down by the investigators.'[10] The judges ruled in favour of the Prosecution on this occasion (as usual) and the witness, Milan Milanović, was allowed to submit his statement as evidence. (Judge Robinson dissented saying that the evidence was far too important to be reduced to a written summary.[11]) Similar problems occurred on 10 October 2002:

> Slobodan Milošević: 'Mr. Samardžić … all I'm doing is asking you to explain your statement, because you say on page 5, the penultimate paragraph … ' [Milošević quotes from the statement.]
>
> Witness Nikola Samardžić, 'I did not say that. Whatever is written there, I did not put it that way. I am presenting here before the Tribunal matters as I recall them. Now, if this was put into my mouth, I don't think that is in order.' [12]

In other words, this Prosecution witness claimed that the Prosecution had tampered with his evidence. On 26 November 2003 it became apparent a witness had not even seen the statement submitted in evidence,[13] while on 10 December 2003,

9. Trial transcript, 23 July 2003, p. 24792.
10. Trial transcript, 10 October 2003, p. 27201.
11. Ibid., p. 27228.
12. Trial transcript, 10 October 2002, p. 11391.
13. Slobodan Milošević: 'So in paragraph 4 you said that problems in the interrelations between the SDS and the SDA in the area of Krupa resulted from the – their attitude towards the role of the JNA in the conflict in Croatia.' Witness Esad Velić: 'I don't have that statement with me. It hadn't been given to me.' Trial transcript, 26 November 2003, p. 29586.

witness Mehmed Musić submitted various statements made over a period of years which did not tally with each other.

The question was never resolved whether the Prosecution had deliberately tampered with witness statements, but language problems bedevilled the trial on numerous occasions. The transcripts of the trial are full of mistakes, especially misspellings of place names in the former Yugoslavia. This often makes it impossible to know which places are being discussed. On other occasions, the names of famous people are misspelled, such as when Colm Doyle is quoted as referring to 'Jack Delor'.[14] On one extremely egregious occasion, the interpreters translated 'Republika Srpska', the Serb entity in Bosnia-Herzegovina whose forces were accused of numerous atrocities during the Bosnian civil war, as 'The Republic of Serbia,' the state of which Milošević was president, whereas the whole trial turned precisely on whether the two separate entities were connected and to what extent.

In spite of the discrepancies discovered during cross-examination between the written statements and what the witnesses actually wanted to say, the judges continued to grant Prosecution applications to admit evidence under Rule 92*bis* without the witnesses even coming to court for cross-examination.[15] This policy was adopted very widely – for example, for rape victims – even though the inability to cross-examine them meant that it was impossible to test their highly relevant claim that they had been raped by Yugoslav soldiers.[16] On other occasions, evidence was admitted from witnesses without cross-examination because the witnesses in question were dead.[17] None of this is compatible with the basic right, enshrined in many jurisdictions, customary law and in the

14. Trial transcript, 26 August 2003, p. 25287.
15. Trial transcript, 8 May 2003, p. 20483.
16. See 'Dissenting Opinion of Judge Robinson ... etc.', 4 November 2003.
17. 'Decision on Prosecution Motion for Admission Pursuant to Rule 92*bis* of Proposed Evidence of Deceased Witnesses ...', 14 June 2004.

Tribunal's own Statute, for a defendant to cross-examine the witnesses against him.

Reductions of the rights of defendants by means of Rule 92*bis* during the Milošević trial were at the heart of one of the most damning condemnations issued of the ICTY's Procedures. Attacking his colleagues for having reinterpreted the rules in a manner worthy of Humpty Dumpty ('When I use a word,' Humpty Dumpty said in rather a scornful tone, 'it means just what I choose it to mean, neither more nor less') and in a way which 'seriously prejudices the rights of the accused,' Judge David Hunt said,

> This Tribunal will not be judged by the number of convictions which it enters, or by the speed with which it concludes the Completion Strategy which the Security Council has endorsed, but by the fairness of its trials. The Majority Appeals Chamber Decision and others in which the Completion Strategy has been given priority over the rights of the accused *will leave a spreading stain on this Tribunal's reputation*.[18]

Rule 92*bis* was also used as a pretext for limiting Milošević's right to cross-examine witnesses.[19] This tended to happen when Milošević tried to raise the NATO bombing of Yugoslavia in 1999. For instance, Milošević tried to show that Graham Blewitt of the Prosecutor's office had been guilty of double standards by not writing to the NATO leaders about the war crimes which the Alliance was committing in Yugoslavia, but only to him as president of Yugoslavia about crimes allegedly committed by Yugoslav forces. Judge May repeatedly interrupted Milošević to prevent this line of questioning. Milošević countered that his questioning was relevant to the evidence, letters which had been written to himself and which had been submitted by the Prosecution to the Chamber, but

18. Dissenting Opinion of Judge David Hunt on Admissibility of Evidence in Chief in the Form of a Written Statement, 21 October 2003, paragraph 22, emphasis added.
19. See for instance the cross-examination of anonymous witness B-1448 on 29 October 2003, p. 28288.

May, stubborn and aggressive as ever, refused to have anything of it. Back and forth they went throughout the whole session until at one point, Milošević asked Judge May, 'Mr. May, are you prohibiting me from calling in question or challenging the credibility of this witness?' to which May, incredibly, replied, 'Yes, I am. Now move on.'[20]

May even prevented Milošević from asking Blewitt whether he had obeyed the Tribunal's own rules which require exculpatory evidence to be disclosed. When Milošević asked him whether he had disclosed to him all that he had learned about the NATO attacks, May interrupted to prevent the question being answered.[21] He insisted that Milošević question Blewitt only about the evidence he had given, and this led him to interrupt Milošević when he mentioned that British intelligence had provided much of the 'information' contained in the indictment.[22] May was, by contrast, exceedingly indulgent towards the Prosecutor, Geoffrey Nice, whom he allowed to ask all manner of questions which had nothing to do with the evidence either. When Ton Zwaan testified, Judge May allowed the Prosecution to ask Zwaan questions about medieval history[23] but interrupted Milošević's cross-examination to rule that his questions about genocides committed in Dutch history were 'irrelevant'[24] (Zwaan is Dutch). Milošević cited a Serbia proverb: 'Sweep the dirt in front of your own house first.'[25]

The same happened when Milošević was cross-examining the former Supreme Commander of NATO General Wesley Clark, on 15 December 2003. Not only did the ICTY agree to let the US government censor the transcript before releasing it to the public,[26] Judge May also flatly refused to let Milošević

20. Trial transcript, 30 October 2003, p. 28327.
21. Ibid., p. 28356.
22. Ibid., p. 28350.
23. Trial transcript, 20 January 2004, p. 31174.
24. Trial transcript, 21 January 2004, p. 31190.
25. Ibid., p. 31191.
26. Trial transcript, 15 December 2003, p. 30368.

ask any questions about the NATO bombing, saying that it had not been part of his 'evidence'. It was a surreal situation. Again Milošević argued the toss with Judge May, and again May stubbornly interrupted whenever the question of the NATO bombing was mentioned. Eventually, Milošević asked, 'Mr. May, just in order to clarify the basic attitude towards me in relation to this witness, is it in dispute that General Clark was in command of NATO during the war against Yugoslavia? And is it disputed that that was his most important role in everything that related to Yugoslavia? And is it in dispute that you're not allowing me to ask him anything at all about that?' May replied, 'That's right.'[27]

In another example, when Milošević was cross-examining General Rupert Smith, Smith alleged that General Ratko Mladić must bear responsibility for the massacre at Srebrenica because he was in command. Milošević asked Smith whether he, Smith, similarly bore responsibility for massacres committed by NATO during the attack on Yugoslavia in 1999, when he had been deputy Supreme Commander of NATO. Judge May ruled this question out of order.[28]

The trial very often went into 'closed session'. Sometimes whole sessions would be closed, on other occasions just parts. Milošević himself protested about the widespread use of closed sessions on many occasions. On 24 October 2002, the trial went in and out of closed session repeatedly, at one point when Milošević was actually protesting about the matter:

> Slobodan Milošević: I should like first of all to make an objection and say that this has now become widespread practice, it appears, that all this is taking place in private sessions. It is my firm conviction, and I don't mean only with respect to this witness but with several of the previous witnesses as well, that the arguments put forward for the protection of witnesses are being used too

27. Ibid., p. 30,418.
28. Trial transcript, 9 October 2003, p. 27367.

> widely and for the public to be excluded from the examination taking place. [transcript then redacted][29]

When the transcript re-emerged into public session several blank pages later, Judge May said, 'That's precisely the point which was in issue. Now, that was in private session, as you know quite well. Now, this objection will stop. No point making it.' But we have no idea what the objection was because the ICTY has decreed it to be a secret.

Another example is the testimony of Milan Babić, the former president of the Serb Republic of Krajina (the Serb enclave in Croatia), who initially gave evidence as an anonymous witness, named C-061. Much of the testimony was given in closed session. On 22 November 2002, the court went into closed session on no fewer than thirteen occasions, while on 25 November 2002, there were eight breaks for closed sessions which lasted between two and thirty minutes each.[30] Babić's identity was eventually revealed, not least because on 26 November 2002 Judge May himself accidentally referred to the anonymous witness by his real surname when the court was in open session, and the whole of his testimony has now been made public.[31] Most others, however, remain secret: the testimony of witnesses C-60 and C-20, heard on 22 and

29. Trial transcript, 24 October 2002, p. 12227.
30. Trial transcript, 22 November 2002. The whole of the session has now been rendered public but the Registrar calls 'private session' thirteen times. At the time, therefore, those parts of the hearings were held in secret.
31. I am grateful to Vera Martinović whose excellent reports on the trial, published in the Jurist website <www.jurist.law.pitt.edu>, are one of the best sources of reporting on the trial. Mrs Martinović kindly sent me the whole of her posts for the purpose of writing this book. Unfortunately, Judge May's slip of the tongue no longer appears on the transcripts for that day because the witness' anonymity was lifted and the whole transcript, including the closed sessions, eventually made public. In the transcripts, therefore, the witness is addressed as 'Witness Milan Babić' even though the speakers would have actually said 'Witness C-061' while in closed session.

23 October 2002, have huge chunks censored ('redacted' is the official euphemism), while the other sessions were held completely in secret. A glance at the transcript for 1 May 2003, for instance, shows the accused entering court at 9.04 a.m. and the session adjourned at 1.52 p.m., but everything else in between is blank. It is a secret who testified that day and what was said. The same goes for witness B-1021 whose testimony, given on 3 and 4 December 2003. It is impossible to see what such censorship is supposed to do for the cause of transparency and historical truth, let alone justice, causes which the ICTY claims to support.

Censorship was practised even for specific pieces of information, and not just for certain chunks of testimony. For instance, on 1 April 2003 there was the following exchange between Milošević and a witness, Alija Gusalić:

> Milošević: Now, tell me, please, is it true that you went to the Radojka Lakić elementary school?
> Witness Gusalić: Yes.
> [redacted]
> [redacted]
> Judge May: That is totally irrelevant. That's a most improper question.
> Milošević: Mr. May –
> Judge May: No, it is not a proper question, and the witness will not have to answer it. Now, kindly confine yourself to what is relevant and proper.
> Geoffrey Nice: May that passage be redacted from the transcript.
> Judge May: Yes. Now, go on to something else.[32]

What was this 'improper question'? We will never know. One astute commentator has concluded that it probably referred to the fact that the school in question was for children with 'special needs', that is, that the witness was mentally handicapped. Later in the session, the same witness reacted angrily when Milošević said that a man who threw a hand grenade at some Serbs was a mental patient and an alcoholic: 'Apparently, when

32. Trial transcript, 1 April 2003, p. 18300.

you're talking,' the witness said to Milošević, 'everyone was a mental patient that graduated from special schools.' Milošević replied, 'No. Quite the opposite. Only the individuals, specific individuals that I mentioned.'[33] Still later, in response to another question, the witness said, 'I don't know. I'm not good at remembering names. I don't even know my children's names.' Milošević asked, 'You don't know your children's names?' and the witness replied, 'No.'[34] At this point, Milošević addressed Judge May and referred specifically back to the earlier moment when his questions had been ruled out of order:

> Mr. May, as you have cautioned me and said that I asked improper questions, there are some other questions which in your opinion could be – have been along these lines, but the witness himself says he doesn't know the names of his children, and the improper questions that I asked are relevant in order to assess the credibility of this person's testimony.[35]

If the witness was indeed a mental patient who could not even remember his own children's names, then his credibility was indeed open to question. But the judge refused to relent and, as ever, sided with the Prosecution and its witness against Milošević.

From the very first day of the proceedings, indeed, when Judge May twice switched off Milošević's microphone, the presiding judge adopted an overbearing and aggressive tone towards the ICTY's star witness. He became notorious for siding outrageously with the Prosecution: before the BBC journalist, Jackie Rowland, testified as a Prosecution witness in the trial, she was advised by Geoffrey Nice to pause before answering each question 'to give the judge [May] the opportunity to interrupt and rein Milošević in'.[36] (Jacky Rowland evidently

33. Ibid., p. 18320. The astute commentator is Vera Martinović, whose web posts on the trial on the Jurist website are very useful <www.juristlaw.edu>.
34. Ibid., p. 18333.
35. Ibid., p. 18333.
36. 'Grilled by the butcher', Jacky Rowland, *Guardian*, 29 August 2002.

felt that she got the better of Milošević. She gave a self-satisfied account of her own day in court in the *Guardian*, even though she admitted there that during her three years as the BBC correspondent in Belgrade she had never once even seen Milošević in the flesh, let alone interviewed him, and that she had not learned Serbo-Croat either. However, like many of her colleagues, for example, Janine di Giovanni of *The Times* who also said she wanted to testify against the former president, Rowland relished the chance to do battle with Milošević. She agreed to be a Prosecution witness although some said this might compromise her neutrality. Di Giovanni told this author in 1999 that during the Kosovo war she had been 'trying to help' the KLA with her reporting.[37])

There is no doubt that May did often 'rein Milošević in'. He made something of a habit of it, repeatedly intervening to stop Milošević from pursuing lines of questioning when they got too near the bone. In one dramatic piece of testimony, Radomir Marković, a witness for the Prosecution and a former head of the Yugoslav secret services, alleged that he had been tortured by the new government in Belgrade in order to force him to come to The Hague and testify against Milošević. In particular, he alleged that the new interior minister had taken him out of his prison cell, where he was facing trial for corruption, and told him over dinner that he could walk free if he agreed to testify against the former Yugoslav president. The evidence he gave was a disaster for the Prosecution because he testified that there had never been any plan to drive the Albanians out of Kosovo and that, on the contrary, the Yugoslav armed forces had been given specific orders to protect civilians.

The exchange went like this:

> Milošević: Did you ever get any kind of report or have you ever heard of an order to forcibly expel Albanians from Kosovo?

37. 'Di Giovanni: "I would testify",' by Ciar Byrne, *Guardian*, 25 October 2002.

Marković: No, I never heard of such an order. I never heard of such an order, nor have I seen such an order, nor was it contained in the reports I received. Nobody, therefore, ever ordered for Albanians from Kosovo to be expelled.

Milošević: Did you receive any information which would point to such a thing, to the existence of an order, a plan, a decision, a suggestion, or a de facto influence that Albanians from Kosovo were to be expelled?

Marković: No, I never heard of such a suggestion. I know of no plan or design or instruction to expel Albanians from Kosovo.

Milošević: And at the meetings that you attended ... is it true that completely the opposite was said; we always insisted that civilians should be protected, that civilians should be taken care of, so that they are not hurt in the course of anti-terrorist operations?

Marković: Certainly. The task was not only to protect Serb civilians, but also the Albanian population and citizenry. ...

Milošević: Didn't we try, from the very top down ... to stop this flow of refugees who were leaving, that we tried to explain to them, to convince them, through good arguments, that the army and the police would protect them ... ?

Marković: Yes, that was the instruction, and those were the assignments. ...

Milošević: And do you know that the KLA carried out propaganda, that as many civilians as possible should leave Kosovo and thus stage an exodus ... ?

Marković: Yes, I'm aware of that.[38]

But when Milošević started to question Marković about the 'deal' offered him by the Belgrade authorities, which he characterised as 'torture' because the UN Convention on torture includes precisely this kind of behaviour, Judge May intervened to stop the line of questioning: 'This doesn't appear to have any relevance to the evidence the witness has given here, none at all … We're not certainly going to litigate here what happened in Yugoslavia when he was arrested.'[39] Milošević protested but May stopped him again. A third time,

38. This is a summary. For the full exchange, see Trial transcript, 26 July 2002, pp. 8727–59.
39. Trial transcript, 26 July 2002, p. 8765.

Milošević asked Marković, 'Is it true that inciting somebody to false testimony and false accusations is a criminal act under our law?' and Judge May intervened to say, 'That is precisely the point that has been ruled against.'[40] He did this in spite of the fact that Milošević was specifically alleging that the 'deal' had been struck in collusion with the Office of the Prosecutor, that is, that the Prosecutor was guilty of complicity in torture, and in spite of the fact that the ICTY's own Annual Report of 1994 had stated specifically that evidence would be excluded if it had been obtained 'by a serious violation of human rights'.[41] As it happens, in a very sinister move, the ICTY had amended its own Rules of Procedure to lift this very restriction in 1997: whereas the original Rule 95 had been entitled 'Evidence Obtained by Means Contrary to Internationally Protected Human Rights', and had ruled that such evidence was inadmissible, the twelfth revised version of the Rules of Procedure, amended in October–November 1997, dropped the reference to 'contrary to internationally protected human rights' and instead entitled Rule 95 simply 'Exclusion of Certain Evidence'. The new version says only in very vague terms that evidence will be declared inadmissible only if there are doubts about its 'reliability', or if its admission would damage the 'integrity' of the proceedings. So evidence obtained by torture is admissible.

Judge May intervened again when, in May 2003, Milošević tried to ask a witness, a Frenchman called Renaud de la Brosse – who appeared as an expert witness on Serb propaganda even though he does not even speak Serbian – whether he had analysed the contents of the media programmes on which he based his reports. May doggedly refused to let Milošević ask the question, ruling it incomprehensible, even though (or perhaps because) the line of questioning was presumably intended to

40. Trial transcript, 26 July 2002, p. 8766.
41. ICTY First Annual Report, 29 August 1994, paragraph 72.

undermine the value of the evidence being presented.[42] On 3 July 2002, he intervened to stop Milošević putting a question to a Kosovo Albanian witness who had submitted as evidence a shirt riddled with bullet holes, which he claimed to have been wearing when Serb forces tried to execute him.[43] How had he managed to live if his body had been riddled with bullets? The witness said in his statement that God had miraculously saved him from death, and that he had lain still under a pile of dead bodies and then ran away to hide in the woods for two days. This old chestnut has been spun on so many occasions by people claiming to be victims in Bosnia and Kosovo that it must be discounted as irredeemably tainted and incredible. On 29 August 2003, May got into a spat with the *amicus curiae*, Branislav Tapušković, who was trying to undermine a witness' evidence.[44] On 3 June 2003, Milošević asked a witness how he could say certain men had 'never been seen again' when he also said he did not know who they were; Judge May intervened to rebuke Milošević for 'provoking' the witness.[45]

Apart from May's stubborn interruptions, the trial was also remarkable for the huge number of useless witnesses called by the Prosecution. This was largely due to the ICTY's rules allowing hearsay, whose evidentiary value was demonstrated as worthless on numerous occasions. One witness testified that he had seen arms deliveries from Serbia to Republika Srpska in Bosnia, but – as Milošević's cross-examination established – what he had actually seen were civilian trucks which, people told him, contained weapons: he admitted that he had never actually seen the weapons himself.[46] A French journalist recounted how a drunk 'man with a knife' in a bar had told him that he had slit the throat of Muslims, as if this was of

42. Trial transcript, 20 May 2003, p. 20845.
43. Trial transcript, 3 July 2002, p. 7324.
44. Trial transcript, 29 August 2003, p. 25648.
45. Trial transcript, 3 June 2003, p. 21554.
46. Trial transcript, 11 June 2003, p. 22083.

any probative value to anyone.[47] On plenty of other occasions, witnesses testified about alleged crimes but were unable to say who the alleged perpetrators were. In many of those cases, even the identity of the witnesses was unknown, with the absurd consequence that the trial spent much time listening to unknown people 'testifying' about unknown crimes.

Other testimonies were equally absurd, such as the woman who testified about abuses committed at Serb camps in Bosnia when in fact she had been interned for the relevant nine months in a Croatian camp, and had never been in a Serb-run camp at all. She therefore had no eyewitness evidence at all about the things she was alleging.[48] A protected witness, who had criminal convictions which could not be discussed in open session, claimed that he had overheard Milošević talking about Greater Serbia in a casino in Novi Sad, and that he had noted the fact in his diary. The dates were vague and did not tally, but he quoted from notes allegedly taken from this diary. Under cross-examination by Milošević, it turned out that the diary did not exist.[49] When the Prosecution looked into the matter, it was forced to admit, also under cross-examination, and in a truly hallucinatory exchange with the defendant, that it had travelled to the witness' home to find the original diary but that it had failed to do so because his mother had conveniently destroyed it.[50]

Much of the rest of the trial, as it happens, produced evidence that was exculpatory of Milošević, even though much of it came from Prosecution witnesses. The former federal prime minister of Yugoslavia, Ante Marković, who initially appeared as an anonymous witness, C-062, tried to claim in his testimony that he had not started the war by giving the order to activate the army in Slovenia to protect the borders after these had been

47. Trial transcript, 28 October 2003, p. 28112.
48. Trial transcript, 10 March 2003, p. 17439.
49. Trial transcript, 29 April 2003, p. 19769.
50. Trial transcript, 12 February 2004, pp. 32059–65.

seized by Slovene secessionist forces. But Milošević produced the transcripts from the federal government cabinet meetings on 21 August 1991, which stated that Marković clearly had given the order to the police and the army.[51] Marković panicked and appealed to the judge, 'He [Milošević] wants to transform the indictment against him into an indictment against me. I ask to be protected.'[52]

When Marković returned to give evidence a second time on 15 January 2004, he and Milošević again argued about who had ordered the army into operations in Slovenia. Milošević again produced stenographic notes from the relevant cabinet meetings indicating that Marković had given the order; Marković protested that, although he was the prime minister of Yugoslavia at the time, he had no control over the army.[53] Marković bleated that he was in a weaker position than the imprisoned Milošević: 'I do not have all the documents that Mr. Milošević has, and I am completely in an inferior position because I was unable to get anything from my office, whereas he got everything.'[54] Ante Marković's role in the break-up of Yugoslavia and the outbreak of war was also discussed at length on 20 November 2003, the last day of Borisav Jović's fascinating testimony, where Jović made it clear that he thought Marković's hated and damaging economic 'reforms' were the primary cause of the country's collapse.[55]

Anonymous Prosecution witness C-037 was supposed to testify that the Yugoslav army had committed atrocities in western Slavonia in Croatia, and that Milošević was pulling the strings as president of Serbia. This link between Milošević and the fighting in Croatia in late 1991 was the key to the Croatia part of the indictment. But C-037 testified that the Yugoslav

51. Trial transcript, 23 October 2003, p. 28079.
52. Ibid., p. 28089.
53. Trial transcript, 15 January 2004, pp. 30827–39.
54. Ibid., p. 30833.
55. Trial transcript, 20 November 2003, pp. 29359–60.

National Army was deployed only to prevent conflicts, not to fight for the Serbs as alleged by Croats and in the indictment.[56] He testified instead that the fighting had been between local Serbs and Croats:

> Milošević: Is it correct that holding the posts you did, and you have just said that you have read the indictment against me, is it correct that you have no knowledge of any of the crimes alleged against me?
> C-037: As for crimes, I don't know that you yourself perpetrated any crime.[57]
> Milošević: As far as you know, Serbia, and I as its president, did we have any connection with what you say you read in the indictment?
> C-037: I do not know whether you personally have anything to do with the crimes or Serbia itself. I spoke about the crimes that were perpetrated there. That was my answer.[58]
> Milošević: In the office that you held, you didn't know of any assistance to the Territorial Defence of Western Slavonia by the ministry of Serbia?
> C-037: No, I don't.[59]

Similar testimony was offered by Zoran Lilić, a senior-ranking Serb and Yugoslav politician who had been federal president before Milošević's election to that post, and deputy federal prime minister under him. He was called as a Prosecution witness and his evidence was evidently expected to be damaging to Milošević: before Milošević started his cross-examination of Lilić, Judge May said to Milošević, 'I warn you not to waste time arguing with the witness.'[60] As it turned out, however, Lilić's testimony was a disaster for the Prosecution and vastly corroborated Milošević's version of events. Lilić said that Milošević's desire for all Serbs to live in one state did not mean that he wanted Greater Serbia and the destruction of

56. Trial transcript, 3 October 2003, p. 10819.
57. Ibid., p. 10820.
58. Ibid., p. 10822.
59. Ibid., p. 10825.
60. Trial transcript, 18 June 2003, p. 22679.

Yugoslavia, as the Prosecution claimed, but on the contrary the preservation of it.[61] (In old Yugoslavia the Serbs did indeed live in one state.) He testified that Milošević had nothing to do with Srebrenica,[62] and that he exercised control over neither the Bosnian Serbs nor the Croatian Serbs.

> Geoffrey Nice: What control, if any, did the accused have over the leadership of the Croatian and Bosnian Serbs?
>
> Lilić: I said a moment ago that the word 'control' in my opinion is too strong. But he certainly wielded a great deal of influence over them. But it is a fact that that influence was not sufficient for them to do everything required of them, for instance, with respect to peace plans, Cutileiro, the Vance Plan, the contact group plan, right up to Dayton. In any event, the aid [was] coming from the Republic of Serbia and the Federal Republic of Yugoslavia. But when I say 'the Federal Republic of Yugoslavia,' I really mean mostly the Republic of Serbia was the only way to correct their behaviour, and this proved true in 1994, when sanctions were enforced against the government of the Republika Srpska.[63]

In other words, the only effective influence Milošević exercised over the leadership of the breakaway Serb provinces in Bosnia and Croatia was through the withholding of aid to force them to sign peace agreements.

Lilić also testified that there had been a vicious terrorist campaign in Kosovo, directed mainly against non-Albanians but also against sections of the Albanian population;[64] that Milošević and his government had always made a strict distinction between the terrorists and the Albanian people as a whole;[65] that orders were repeatedly given that no counter-insurgency operations were to be launched in Kosovo if they would endanger civilians;[66] and that there had never been any

61. Trial transcript, 17 June 2003, p. 22563.
62. Ibid., p. 22611.
63. Ibid., p. 22614.
64. Trial transcript, 18 June 2003, p. 22681.
65. Ibid., p. 22682.
66. Ibid., p. 22683.

plan to expel the ethnic Albanians from Kosovo.[67] He also expressed the view that the Serbs in Bosnia and Croatia had acted in self-defence and that officials from the government of Serbia had always tried to foster peace.[68] It was because this evidence, like that of Radomir Marković, was so disastrous for the Prosecution that Judith Armatta, a journalist for the Coalition for International Justice – one of the lobby groups behind the creation of the ICTY and which often works in tandem with it – railed in fury against Lilić, abandoning all pretence at legal sobriety and writing that Lilić had behaved 'like a cur'.[69]

There were many other disasters for the Prosecution. There was the mortician from Zvornik, anonymous Prosecution witness B-1775, who testified to a series of horrific attacks by Muslims against Serb civilians.[70] A member of the Crisis Staff in the Serb municipality in Zvornik, anonymous Prosecution witness B-24, testified that the Crisis Staff's only job was to protect Serbs and never to attack Muslims.[71] Anonymous Prosecution witness C-47 testified about crimes committed by Chetniks in Croatia but said that he had joined the Chetniks 'to topple Milošević and the Communists', that is, that they were not his agents or even followers but instead his enemies.[72] Prosecution witness Osman Selak claimed that the Bosnian Serb army was under the de facto control of Belgrade, as the Prosecution alleged, but under cross-examination could not produce a single example of an order issued by the Yugoslav army to the Bosnian Serb army.[73] In testimony which was very hostile to Milošević, Michael Williams, a former UN official

67. Ibid., p. 22688.
68. Ibid., p. 22690.
69. Judith Armatta, 'Dealing with the "Hostile" Inside witness', 15 July 2003 <www.cij.org>.
70. Trial transcript, 29 May 2003, e.g. pp. 21359–64.
71. Trial transcript, 5 June 2003, p. 21835.
72. Trial transcript, 10 June 2003, pp. 21953–54.
73. Trial transcript, 12 June 2003, p. 22288.

in Bosnia, also could not say that Milošević controlled the Bosnian Serbs but only that he used his influence on them to bring about an end to the fighting.[74]

Dražen Erdemović's testimony on Srebrenica also backfired spectacularly. Erdemović is an ethnic Croat mercenary who had fought on all sides in the Bosnian civil war. In the Bosnian Serb army he had participated in the massacre at Srebrenica in July 1995. He was arrested in Milošević's Yugoslavia and extradited to The Hague, where he pleaded guilty to participating in the killing of over a thousand Muslims in cold blood, of which he had personally killed about one hundred. He testified in court that the massacre had been carried out by people of all ethnicities, and was asked by Milošević whether anyone from Serbia itself had been involved in the Srebrenica massacre:

> Milošević: Tell me, please, at the time of the attack or at the time when these events took place, the ones that you describe later, could you see or hear of the participation of anyone from Serbia in these events?
>
> Erdemović: I could not see anyone who was from Serbia according to what I could see or tell.[75]

Colm Doyle, an Irish Defence Force officer who served with the UN in Bosnia, testified that Milošević supported peace in Bosnia; that Belgrade exhorted the Bosnian Serbs to avoid bloodshed; that it had condemned the shelling of Sarajevo; that Radovan Karadžić had called for UN monitors to be attached to Bosnian Serb army units; that Milošević had said that perpetrators of war crimes in Bosnia would be arrested if they entered the territory of Serbia; that Belgrade was sending humanitarian aid to all three ethnic groups in Sarajevo; that Milošević was doing everything he could to bring about peace,[76] and that the original vote in the parliament of Bosnia-Herzegovina in October 1991 to hold a referendum on

74. Trial transcript, 25 June 2003, pp. 23062–63.
75. Ibid., p. 25168.
76. Trial transcript, 26 August 2003, pp. 25301–305.

independence had been held in the middle of the night, after the session had been formally declared closed, at 3.30 a.m. on 24 October 1991.[77] (The Bosnian Serb view was that this made the vote unconstitutional. Much of the rest of Colm Doyle's testimony revealed him to be astonishingly ignorant about the sequence of events which led to the outbreak of war in Bosnia. He had, for instance, never heard of the Cutileiro plan.)

Anonymous Prosecution witness C-1071 testified that the Yugoslav National Army (JNA) had protected people at Vukovar in Croatia; that she had not seen JNA soldiers committing any crimes or illegal acts, and that the fighting started only after the JNA barracks was attacked by Croats.[78] Anonymous Prosecution witness B-1505 testified that the people of Višegrad in Bosnia had asked the JNA for protection and that they had indeed protected them (although he also, incoherently, accused the JNA of carrying out ethnic cleansing).[79] Milan Milanović, Deputy Defence Minister for the Serb Republic of Krajina, was asked about the relationship between the Yugoslav army and the army of the Serbian Krajina.

> Milošević: In the chain of command, did the general staff of the JNA command any operations in the territory of the Republic of Serbian Krajina?
> Milanović: I have no such information.[80]

Similar exculpatory evidence was offered by other witnesses called by the Prosecution. Anonymous Prosecution witness B-1122 admitted that the SDA (the Muslim 'Party of Democratic Action') in Bosnia called on Muslims not to answer the JNA's mobilisation call and on those Muslims already in it to leave:[81] this made the claim rather odd that the JNA had been co-

77. Ibid., pp. 25312–13.
78. Trial transcript, 28 August 2003, pp. 25503–12.
79. Trial transcript, 29 August 2003, p. 25708, 2 September 2003, p. 25873.
80. Trial transcript, 14 October 2003, p. 27476.
81. Trial transcript, 21 October 2003, p. 27779.

opted by Serbs to constitute a Serb army. Prosecution witness Dobrila Gajić-Glisić testified that there had never been a 'Greater Serbia' plan; that the Yugoslav army had merely tried to protect Serbs in Croatia and Bosnia;[82] that the Yugoslav army command tried to bring paramilitaries under control in the correct legal manner,[83] and that there had never been a plan in the Ministry of Defence in Serbia to persecute non-Serbs.[84] Prosecution witness Borisav Jović, the Serb member of the Federal Yugoslav Presidency in 1989 and 1990 and later president of the Socialist Party of Serbia, testified that there had never been a Greater Serbia plan[85] and that Milošević controlled neither the federal presidency of Yugoslavia nor the federal army.[86] An opposition journalist (a member of the Democratic Party of the late Zoran Djindjić) from Serbia who appeared as a Prosecution witness testified that he was free to write what he liked, even though part of the Prosecution case was that Milošević controlled the media.[87] Even one of the Prosecutor's own officials, Dean Paul Manning, who testified on the basis of his examination of bodies at Srebrenica, admitted that his reports contained no evidence linking the killings with the authorities in Yugoslavia.[88]

The same lack of evidence linking Milošević to the wars in Bosnia and Croatia was effectively admitted by Reynaud Theunens, a Belgian military intelligence officer also employed by the Office of the Prosecutor. He came to give evidence on his military analysis reports for Bosnia and Croatia. Milošević asked him:

> Milošević: Where do you see any command and control exerted by the VJ [Yugoslav army] over the VRS [Army of the Republika

82. Trial transcript, 22 October 2003, p. 27900.
83. Ibid., p. 27896.
84. Ibid.
85. Trial transcript, 19 November 2003, pp. 29216–18.
86. Chamber transcript, 19 November 2003, pp. 29244–46.
87. Trial transcript, 13 January 2004, p. 30733.
88. Trial transcript, 26 January 2004, p. 31421.

> Srpska] or the SVK [Army of the Serb Republic of Krajina]? I asked you, and you showed me a document where Perišić just conveyed my request to let the UNPROFOR through. If that's what you call command and control of the army, then be it. You are an analyst who seems to have gathered all available documents. Where did you see a document whereby the General Staff of the army of Yugoslavia gives an order to the army of Republika Srpska or the Serbian army of Krajina?
>
> Theunens: Well, first of all, I think it's important to emphasise that I looked at documents that are available. The fact that documents are not available don't [sic] mean they don't exist, and that's an important constraint or limitation to this report.[89]

Elsewhere he said, 'The fact that we don't have orders don't [sic] mean they don't exist.'[90] How would a criminal court in England react if the police said that the fact they had no evidence that someone had committed a crime did not mean that the evidence did not exist? The only 'order' Theunens could come up with was an instruction from Milošević to the leader of the Krajina Serbs to facilitate the transfer of UNPROFOR aid to western Bosnia.

Finally, Lord Owen, who appeared not as a Prosecution witness but as a Court witness during the Prosecution part of the trial, testified that Milošević had supported the Vance-Owen peace plan (which provided for an independent Bosnia-Herzegovina, without Republika Srpska being annexed to Serbia) and that he had tried to get the Bosnian Serbs to accept it too.[91] He agreed moreover that Milošević was not a racist and hardly even a nationalist but above all a pragmatist.[92]

Of course these witnesses also made a number of allegations against Milošević and it would be wrong to present their evidence as entirely exculpatory. There is little doubt that bad things happened during all these wars, and forensic evidence

89. Trial transcript, 27 January 2004, p. 31589.
90. Ibid., p. 31576.
91. Trial transcript, 3 November 2003, p. 28373.
92. Ibid., p. 28404.

for some individual atrocities was fairly strong. But all of the witnesses mentioned above appeared during the Prosecution part of the Milošević trial: given that the indictment was based on accusations of systematic persecution and not just individual war crimes, with enemies like that, who needs friends?

9
Trial in Absentia

IT BECAME INCREASINGLY obvious throughout 2002 and 2003 that the Prosecution case was coming apart at the seams. The political nature of the charges was the direct cause of the vastness of the trial, and consequently it started to escape the Prosecution's control. Meanwhile Milošević displayed intimate knowledge of the facts and his skills as a cross-examiner impressed even the prosecutors. In 2003, Geoffrey Nice admitted, 'The Accused has shown himself to have rapidly developed the skills of cross-examination.'[1]

As the Prosecution not only broke the time limits which the judges had imposed but also failed to produce the famous 'smoking gun' evidence which it had often trumpeted in the media, the judges took two decisions which demonstrated their absolute determination to press on with the trial, come what may, and in contravention of their own rules and of the rules of established criminal procedure.

The first of these decisions was taken after the sensational announcement on 22 February 2004 that the presiding judge, Richard May, was resigning for health reasons. This was potentially catastrophic for the trial. In many jurisdictions, the trial would collapse in such cases. Given that there is no jury and only three judges, the disappearance of one judge is equivalent to the disappearance of four out of twelve jurors.

The Rules of Procedure of the ICTY have a provision for dealing with the resignation of a judge. Before 12 December 2002, these rules stated clearly that, in the event of the absence

1. Trial transcript, 23 July 2003, p. 24761.

of a judge, a new judge may be appointed but 'the continuation of the proceedings can only be ordered with the consent of the accused.'[2] The subsequent paragraph D provided that the President could authorise the Chamber to deal only with routine matters in the absence of a judge. These rules were changed in December 2002 with the insertion of a new paragraph D, which read:

> If, in the circumstances mentioned in the last sentence of paragraph (C), the accused withholds his consent, the remaining Judges may nonetheless decide to continue the proceedings before a Trial Chamber with a substitute Judge if, taking all the circumstances into account, they determine unanimously that doing so would serve the interests of justice.

In other words, the revision removed the requirement that the defendant give his consent. This is a typical example of how the ICTY's amendments to its Rules of Procedure generally curtail the rights of defendants. In January 2004, in a formal letter to the United Nations Secretary-General, the President of the ICTY qualified the change thus:

> Rule 15*bis* of the Rules of Procedure and Evidence allows two judges to continue proceedings with a substitute judge without the consent of the accused. However, because the substitute judge must certify that he or she has familiarized himself or herself with the record of the proceedings – a provision that is not a mere formality but a requirement of fairness – *Rule 15* bis *cannot be used in cases in which a lengthy trial is significantly under way*.[3]

By the time Richard May announced his resignation in May 2004, there is absolutely no doubt that the Milošević trial was 'a lengthy trial significantly under way'. It had lasted two years and hundreds of thousands of pages had been submitted as 'evidence'. It was impossible for a replacement judge to

2. ICTY Rules of Procedure, Rule 15*bis*C, revision 24, 5 August 2002.
3. Letter dated 13 January 2004 from the President of the ICTY to the President of the Security Council, annex to Letter dated 20 January 2004 from the Secretary-General to the President of the Security Council, UN Doc. S/2004/53, p. 3, emphasis added.

scrutinise comprehensively so much material in time to take May's place.

Judge Meron held a hearing on 25 May 2004 to see whether Milošević gave his consent for the proceedings to continue. Milošević used the occasion to make three requests to the President of the court: first, that he be given more time to prepare his case; second, that he be given more than 150 days (the judges had decided to accord him less than half the time accorded to the Prosecution), and, third, that he be set free on compassionate grounds, saying that he would return to The Hague to fight the case.

When pressed on whether he gave his consent, Milošević insisted that he regarded the ICTY as illegal. He therefore refused to give an answer which might have been construed as recognising its legality. Meron replied that he had no choice but to assume that consent had not been given.[4] The Prosecution concurred. In other words, the very situation had arisen which Meron had foreseen in his letter to the UN Secretary-General. In a flagrant disregard for his own instructions, Meron and his fellow judges decided to impose a new judge none the less. Judge Iain Bonomy was appointed on 10 June 2004. If proof was needed that the ICTY was determined to break its own guidelines in order to ensure that the Milošević trial did not collapse, this was it. (Richard May died in July.)

The political nature of the charges led directly to the second momentous decision of the trial, the decision in 2004 to impose a defence lawyer on Milošević, the day after he had commenced the presentation of his Defence.

At various stages throughout the trial, Milošević's health was an important legal issue. In 2001 and 2002, there were repeated calls from his supporters for him to be set free on

4. Trial transcript, 25 March 2004, p. 32078.

compassionate grounds, their allegation being that his health was fragile and that a prolonged trial would kill him. These requests were rejected.[5] On 5 July 2004, after the Prosecution had concluded its case, and as Milošević was about to start his Defence, the Trial Chamber held a hearing on his health. By this time, the trial had been interrupted a dozen times, and there were five delays to the start of the Defence. The Prosecutor, Geoffrey Nice, had repeatedly alleged that Milošević was either feigning illness or deliberately not taking his own medicine in order to worsen his condition and to delay the trial.[6] Eventually, Milošević's illness was to lead not only to his death in custody, just two weeks after the judges had refused to let him visit a medical clinic in Moscow, but also, in 2004, to one of the most important decisions taken by the ICTY during the trial, the decision to impose a Defence counsel on him against his will.

The decision was taken on 2 September 2004,[7] Milošević having opened his Defence in a two-day statement on 31 August and 1 September 2004. This decision overturned a long series of previous rulings to the contrary, and was in direct opposition to Milošević's repeated demand that he be accorded the right to defend himself.

The decision represented a victory for the Prosecution. The Prosecution had been arguing for this since before the trial

5. Trial transcript, 18 December 2002, p. 14574.
6. For example, 4 September 2003, transcript, p. 26109, when Nice said it was odd that illness always followed the days when hard evidence had been produced in court; 30 September 2003, transcript, p. 27028, when Nice compared Milošević's illness to a hangover and blamed his illness on smoking; 29 November 2005, p. 46641, when Nice referred to the 'apparent' medical condition of the accused and said he was not taking his medicine, and 21 October 2004, see Judge Meron's remarks on p. 4: 'The Prosecution argues Mr. Milosevic has intentionally obstructed his trial by intentional manipulation of his medication regime so as to produce periods of ill health and by systematically disruptive conduct when he's actually in the courtroom', transcript, p. 4.
7. Oral ruling, 2 September 2004, see transcript, pp. 32357–59.

had even started. Until now, the judges had repeatedly rejected the Prosecution's request and stated that Milošević, like all defendants, had a right to defend himself. On Milošević's very first day in court, 3 July 2001, presiding judge Sir Richard May, said, 'Mr. Milošević, I see that you're not represented by counsel today. We understand that this is of your own choice. *You do have the right, of course, to defend yourself*.'[8] On 30 August 2001, Judge May again said, 'The accused is entitled to represent himself.'[9] The judge announced that *amici curiae* ('friends of the court') would be appointed in order to ensure that the trial was fair; he emphasised that the role of the *amici* would be to help the court, not to represent the defendant.

Despite these clear statements, the Prosecution continued to argue that counsel should be imposed. In response to these arguments, on 30 August 2001, and although Judge May had already ruled on the matter, Judge Patrick Robinson (who was later to become the presiding judge after Judge May's death) intervened and made the following statement:

> I do not consider it appropriate for the Chamber to impose counsel upon the accused. We have to act in accordance with the Statute and our Rules which, in any event, reflect the position under customary international law, which is that the accused has a right to counsel, but he also has a right not to have counsel. He has a right to defend himself, and it is quite clear that he has chosen to defend himself. He has made that abundantly clear … I stress that it would be wrong for the Chamber to impose counsel on the accused, because that would be in breach of the position under customary international law.[10]

After Robinson had made his intervention, May returned to the subject a third time, saying, 'Let me add this, Mr Ryneveld: Yes, that is the view of the Trial Chamber, that it would not be practical to impose counsel on an accused who wishes to

8. Trial transcript, 3 July 2001, p. 1, emphasis added.
9. Trial transcript, 30 August 2001, p. 7.
10. Ibid., p. 17.

defend himself.'[11] As if this were all not enough, Judge May restated the position again on 11 December 2001.[12]

The reason why the judges kept repeating their refusal to impose a defence counsel is that the right of an accused person to defend himself is indeed a core right under international and much domestic law. It is enshrined in the Statute of the International Criminal Tribunal itself, Article 21.4(d) of which states, 'The accused shall be entitled … to defend himself in person.' The same Article 21.4(d) of the Charter also says that the defendant has the right to be tried in his presence. This right is listed as one of several 'minimum guarantees', and no qualifications or exceptions are given. Indeed, the ICTY's own 'Directive on the Assignment of Defence Counsel', dated 28 July 2004, reaffirms the right of an accused to defend himself (Article 5).

The right to defend oneself is enshrined in other authoritative international documents as well. Using the very words which have since been integrated into the ICTY's own statute, Article 6.3(c) of the European Convention on Human Rights states: 'Everyone charged with a criminal offence has the following minimum rights: … to defend himself in person.' As in the ICTY statute, no exceptions or derogations from this are provided for. The same goes for Article 14.3(d) of the United Nations' International Covenant on Civil and Political Rights, which declares, 'In the determination of any criminal charge against him, everyone shall be entitled to the following minimum guarantees: … to defend himself in person.' Once again, the right is a 'minimum guarantee', there are no exceptions.

However, the issue surfaced again in late 2002, when Milošević's health caused several interruptions to the trial. The trial was delayed three times in its first six months (February–July 2002) because of Milošević's poor health,[13] and again

11. Ibid., p. 18.
12. Trial transcript, 11 December 2001, p. 149.
13. 'Slobodan Milošević is on the verge of a heart attack', *Pravda*, 25 July 2002.

for a week in November 2002 even though, in August 2002, a Tribunal doctor had instructed that Milošević have four consecutive days of rest every two weeks. On 6 November 2002, Milošević's supporters called on the ICTY to release him because of high blood pressure due to malignant hypertension.[14] Milošević himself requested provisional release on medical grounds;[15] Gennadi Zyuganov of the Russian Communist Party fired off a statement accusing the Hague Tribunal of trying to kill their most famous defendant,[16] and the upper house of the Yugoslav Parliament called for the former president to be released on medical grounds.[17]

So the Prosecution again applied for defence counsel to be imposed on 8 November 2002. Again, the Trial Chamber rejected the request, in an oral ruling on 18 December 2002.[18] On 4 April 2003, the Trial Chamber issued a lengthy document laying out its reasons for the oral ruling.[19] It reviewed the ICTY's own statute and concluded that, 'A plain reading of this provision [Article 21.4(d)] indicates that there is a right to defend oneself in person and the Trial Chamber is unable to accept the Prosecution's proposition that it would allow for the assignment of defence counsel for the Accused against his wishes in the present circumstances.'

14. Press release of the International Committee to Defend Slobodan Milošević, 6 November 2002. A team of German doctors issued a similar appeal on 11 November 2002, via the International Committee to Defend Slobodan Milošević.
15. 'Milošević insists on self-defence', BBC News report, 11 November 2002.
16. 'A Manslaughter of Slobodan Milošević is being prepared at The Hague', Public statement by Gennadi Zyuganov, Chairman of the Central Committee of the Communist Party of the Russian Federation (CC CPRF), Chairman of the Peoples' Patriotic Alliance of Russia (PPAR), 11 November 2002.
17. Declaration on the release of Slobodan Milošević to be cured in Yugoslavia, Chamber of Republics, Federal Parliament of Yugoslavia, 13 November 2002.
18. Transcript, 18 December 2002, p. 14574.
19. Trial Chamber Decision, 4 April 2003, paragraph 18.

The Trial Chamber argued that the imposition of counsel was a feature only of inquisitorial systems, not of the adversarial system used by the ICTY. In support of its view that the imposition of counsel was inadmissible, the Trial Chamber quoted the US Supreme Court case *Faretta* v. *California,* 422 U.S. 806 (1975), which states, 'We confront here a nearly universal conviction, on the part of our people as well as our courts, that forcing a lawyer upon an unwilling defendant is contrary to his basic right to defend himself if he truly wants to do so.' The Supreme Court held that imposition of counsel would violate the spirit of the Sixth Amendment. The ICTY Trial Chamber commented:

> It [the Supreme Court] pointed out that only the sixteenth century Star Chamber in the long history of English legal history adopted a practice of forcing counsel upon an unwilling defendant in criminal proceedings, and recounted Stephen's comment on this procedure: 'There is something specially repugnant to justice in using rules of practice in such a manner as to debar a prisoner from defending himself, especially when the professed object of the rules so used is to provide for his defence.'

The ICTY Trial Chamber went on:

> There is a further practical reason for the right to self-representation in common law. While it may be the case that in civil law systems it is appropriate to appoint defence counsel for an accused who wishes to represent himself, in such systems the court is fulfilling a more investigative role in an attempt to establish the truth. In the adversarial systems, it is the responsibility of the parties to put forward the case and not for the court, whose function it is to judge. Therefore, in an adversarial system, the imposition of defence counsel on an unwilling accused *would effectively deprive that accused of the possibility of putting forward a defence.* [Emphasis added].

It concluded that 'The obligation of "putting a case," i.e. putting forward the defence version of events if it differs from that put forward by a witness, is reflected in Rule 90 (H) of the Rules. As the *amici curiae* note, such an obligation cannot

be fulfilled by counsel who is not instructed by an accused as to the defence to put forward.'[20]

The Trial Chamber then reviewed some of the other international documents, which uphold the right of a defendant to defend himself, including the ones mentioned above. They all concur, except that in the ICC's statute, the right to defend oneself is limited only when the defendant behaves in a disruptive manner in the courtroom. (The International Criminal Tribunal for Rwanda in Arusha, indeed, has imposed counsel on a defendant for this very reason.) The Trial Chamber discussed the imposition of counsel in a case in Germany, a case which went to the European Court of Human Rights,[21] but rightly found this case to be irrelevant to the Milošević case because the defendant in question was in any case not defending himself. (The issue at stake was whether he accepted this or that lawyer.) The Chamber concluded that the case law did not allow for exceptions to the general right to defend oneself: 'The international and regional conventions plainly articulate a right to defend oneself in person.'[22] Turning to practicalities, the Chamber concluded that imposition of counsel on a defendant who wanted to defend himself could simply not work because the defendant would refuse to instruct him.[23] It concluded that the core rights of the defendant laid out in Article 21 of its Statute had to be respected even if they appeared to conflict with the need to ensure an expeditious trial.[24]

However, all the main points of this lengthy and unambiguous reasoning were summarily thrown out of the window when Milošević's Defence started. On 2 September 2004, the Trial Chamber ruled that counsel would be imposed after all. It

20. Paragraph 25.
21. *Croissant* v. *Germany*, European Court of Human Rights (ECHR), Case No. 62/1001/314/385, Judgment, 25 September 1992 ('*Croissant* v. *Germany*').
22. Paragraph 37.
23. Paragraph 38.
24. Paragraphs 40 and 41.

gave preliminary written reasons for the Decision on 10 September 2004[25] and then issued a full reasoned decision on 22 September 2004. What it had previously declared to be 'specially repugnant', it now said was 'in the interests of justice'. Every time Milošević protested at the imposition of counsel, which he did on several occasions over many days immediately following the decision, Judge Robinson silenced him by switching off his microphone.[26] Just as Milošević had been treated as a criminal for defending his country against NATO's attack, so now he was prevented from defending himself in court.

There had been further delays to the trial because of Milošević's poor health in late March 2003 and in May 2003. In June 2003, the former Soviet prime minister, Nikolai Ryzhkov, who then chaired the State Duma's Special Committee on Yugoslavia, called for the trial to be adjourned for a year for this very reason.[27] Proceedings were interrupted again in late July 2003 and twice in September 2003 (at the beginning of September and then from the middle of the month to the first week in October 2003) because the defendant was sick. On 30 September 2003, the defendant's health was again discussed at a hearing at which he was not present, and in February 2004, there were further delays.

However, the justifications given for the ICTY's astonishing volte-face once again demonstrate the Tribunal's fundamental lawlessness. Referring to the 4 April 2003 ruling in his September 2004 ruling, Judge Robinson said, 'The Trial Chamber, while holding that the accused had a right to defend himself, also held in paragraph 40 that the right to defend oneself in person is not absolute.' In fact, what the Trial Chamber had done in

25. Trial Chamber Decision, 10 September 2004, Order on Request for Certification to Appeal the Decision of the Trial Chamber on Court Assigned Counsel.
26. Trial transcript, 2 September 2004, p. 32360; 7 September 2004, p. 32398; 9 September 2004, p. 32633; 14 September 2004, p. 32767.
27. Statement, 16 June 2003.

2003 was quite explicitly to lay down the circumstances in which the right to defend oneself might conceivably be limited (that is, disruptive behaviour), and then to conclude that these circumstances did not apply in Milošević's case. Even though Milošević's health had been an issue ever since the trial started in early 2002, the Trial Chamber made no mention of health as a possible factor which would justify counsel when it gave its reasons on 4 April 2003.

In its written Decision of 22 September 2004, the Trial Chamber seemed to agree with the Prosecution that Milošević had not been taking his medicine as prescribed.[28] But it then specifically said that it was not basing its decision on this claim.[29] The explanation for this apparent inconsistency is surely that if it had been true that Milošević was not taking his medicine, then it would have been a simple matter to tighten the medical regime in prison to ensure that he did. This was not done.

In deciding to impose counsel, the Trial Chamber offered no *legal* argument, that is, no precedent or law, for using the health of the accused as a justification. It admitted that no such precedent existed: 'Extensive research has not led to the identification of any case in any jurisdiction where counsel has been assigned to an accused person because he was unfit to conduct his case as the result of impaired physical health.'[30] To take a decision without reference to law or precedent is to act lawlessly. It is the very definition of arbitrary rule. In spite of the fact that the ICTY is supposed to administer existing law and not create new law, its decision to impose counsel on a sick defendant will now presumably count as a precedent and may be adopted by other jurisdictions, especially international ones.

28. Trial Chamber Reasons for Decision on Assignment of Defence Counsel, 22 September 2004, paragraph 61.
29. Paragraph 67.
30. Trial Chamber Decision of 22 September 2004, 'Reasons for Decision on Assignment of Defence Counsel', paragraph 37, emphasis added.

Instead of basing its decision on legal reasoning, the Trial Chamber simply rescinded all its earlier decisions and said instead that it now was 'in the interests of justice' to impose counsel. No definition was given of these 'interests', and no attempt was made to explain how they outweighed the core rights of the defendant. Milošević was never accused of disruptive behaviour. The failure to offer clear argument on this point was egregious, because the previous rulings on the subject had precisely said that it would be unjust (as well as impractical) to impose counsel against a defendant's will. The Trial Chamber concluded, 'The fundamental duty of the Trial Chamber is to ensure that the trial is fair and expeditious.' In fact, it based its decision to impose counsel solely on expediency, at the expense of fairness.

Even the justification of expediency is bogus: if the judges had been worried that the trial was dragging on for too long, they should have forced the Prosecution to respect the original deadlines by calling fewer witnesses. They could have invoked the precedent of Nuremberg, where twenty defendants were tried in less than a year. They could have refused the Prosecution's request to add in new indictments after the initial one on Kosovo was issued. They could have refused to join the indictments together into a single trial. They were themselves complicit in the fact that the trial had already spun out of control, in spite of the fact that the right to an expeditious trial is also a core right of defendants.[31] Even by the standards of the ICTY, the brazenness of this decision is therefore deeply shocking.

The main argument of the 22 September 2004 Decision was that Milošević's health was too fragile for him to defend himself but not so fragile that the trial should be abandoned altogether. No legal system in the world recognises this distinction, and it is highly doubtful that medicine recognises it either. It would be interesting to know exactly what the doctors told the judges,

31. Articles 20.1 and 21.4(c) of the ICTY Statute.

and what the judges asked them to say. But we will never know, because the relevant reports have been declared confidential by the ICTY.[32]

In deciding to impose counsel, the Trial Chamber obsessively repeated the claim that the right to defend oneself is not absolute. It made this point in paragraphs 1, 8, 39, 41, 42, 43, 45, 49 and 50 of the ruling of 22 September 2004. Yet, as we have seen, the right is in fact described as a 'minimum guarantee' in all the relevant documents, including the ICTY's own statute. The Trial Chamber cleared this obstacle by saying that the ICTY Charter (that is, the statute) should itself be interpreted as a treaty,[33] and to argue that it should therefore be interpreted 'in good faith in accordance with the ordinary meaning of the terms of the treaty in their context and in the light of its object and purpose'. It used the reference to 'object and purpose' to arrive at precisely the kind of 'teleological' interpretation which it had also used to extend its own jurisdiction back in 1995 in *Tadić*,[34] that is, to bend the law to suit its purposes.

32. The reports in question are: Medical Report of Professor Tavernier, 24 July 2004; Medical Report of Dr van Dijkman, 18 August 2004; 'Order to Registrar Concerning Additional Medical Reports', 24 August 2004, Medical Report of Professor Tavernier, 27 August 2004, and Medical Report of Dr van Dijkman, 26 August 2004. They are referred to in footnotes 29–32 of the Trial Chamber decision of 22 September 2004 ('Reasons for decision on assignment of defence counsel').
33. 'From the earliest days of the work of the International Tribunal, it was decided that the Statute is to be interpreted as a treaty.' The reference is to *Prosecutor* v. *Tadić,* Case No. IT-94–1-A, 'Judgement', 15 July 1999, at paragraph 282; *Prosecutor* v. *Delalić, et al*., Case No. IT-96–21-A, 'Judgement', 20 February 2001, at paragraphs 67–70. On another occasion, the Appeals Chamber said something slightly different: 'Although neither the Tribunal's Statute nor its Rules of Procedure and Evidence are, strictly speaking, treaties, the principles of treaty interpretation have been used by the Appeals Chamber as guidance in the interpretation of the Tribunal's Statute, as reflecting customary rules.' Appeals Chamber, 18 April 2002, Reasons for Decision on Prosecution Interlocutory Appeal from Refusal to Order Joinder, paragraph 16.
34. *Prosecutor* v. *Duško Tadić*, Decision on the Defence Motion for Interlocutory Appeal on Jurisdiction, 2 October 1995, paragraph 72.

However, it is impossible to see how this interpretation is 'in good faith', since there is no possible doubt about the ordinary meaning of the words in the statute.

However, it is completely misleading to claim, as the ICTY does, that the right to self-defence is 'not absolute'. Of course there are exceptions to this rule: all rules admit of exceptions. Jurisprudence is precisely the method by which general rules and principles are honed down to take account of particular circumstances. Rules which admit of exceptions do not stop being rules: instead, they become more precise rules. Exceptions to a rule do not invalidate the rule, they merely outline the circumstances in which it may be set aside by other rules and considerations. One can almost say that such exceptions in fact *constitute* the rule, in the sense that they render it more real and precise. This is the meaning of the common saying, 'the exception that confirms the rule'. Jurisprudence is precisely the discipline which does this, moving from the general to the particular and back again in order to make the general rule apply as accurately as possible to various different contingent circumstances.

The ICTY, by contrast, was saying that because a rule admits of some exceptions it can be disregarded in circumstances not governed by those exceptions – that the rule essentially had no validity at all. The fact that exceptions are allowed in some circumstances does not mean they can be allowed in others. Yet this is what the Trial Chamber argued. It reviewed cases which had nothing to do with defendants who suffer ill health but instead with those who are disruptive. For example, in paragraph 33 of the 22 September 2004 Decision, the Trial Chamber states:

> It is widely recognised in domestic jurisdictions that, where an accused who represents himself disrupts his trial by misbehaviour, he may be removed from the court and counsel appointed to conduct his defence. There is no difference in principle between deliberate misconduct which disrupts the proceedings and any other

> circumstance which so disrupts the proceedings as to threaten the integrity of the trial. These are simply examples of circumstances in which the right to represent oneself must yield to the overarching right to a fair trial.

It is incredible that a criminal tribunal should say there is no difference between a deliberate act and an involuntary one, when the doctrine of *mens rea*, central to criminal law, exists precisely to distinguish criminally culpable deliberate acts from accidental ones. The Tribunal specifically stated, in paragraph 67 of the ruling, that it was not basing its Decision on the Prosecution claim that Milošević had been deliberately not taking his prescribed medicine. It therefore discounted, for the purposes of its Decision, the possibility that the defendant's ill health was deliberately caused, or that he was being disruptive.

This elision of intentionally disruptive behaviour with unintentional illness is especially egregious in view of the fact that, in its own ruling of 4 April 2003, the Trial Chamber had specifically considered a case from the Rwanda tribunal, *Prosecutor* v. *Barayagwiza*, and concluded that the Milošević trial was 'very different'. The ICTR ruled against Barayagwiza's application for his counsel to withdraw on 2 November 2000, on the grounds that he was being obstructive and refusing to present a case at all. Crucially, Barayagwiza did not assert his right to self-representation, as the ICTY had itself admitted in 2003.[35] In other words, Barayagwiza's case was the exact opposite of Milošević's, for Milošević precisely was asserting this right.

The Trial Chamber used a similar subterfuge in discussing other qualifications of the general right to defend oneself in person. It discussed, for instance, its Decision in the *Šešelj* case, dated 9 May 2003.[36] That Decision approved the imposition of 'a standby counsel' to assist the defendant, whom it also accused

35. Trial Chamber Decision, 4 April 2003, paragraph 15.
36. Especially the discussion in paragraphs 20–30.

of being obstructive. This was not the case with Milošević and in any case the imposition was not only of 'standby counsel': Milošević's own right to conduct his defence was being taken away. So *Šešelj* did not provide a precedent. (Šešelj was indeed often rude to the judges, refusing to stand up when they entered the courtroom on the days when he appeared as a witness for the Defence in the Milošević trial. He told the judges, 'I was told by priests of the Serb Orthodox Church before arriving here that the uniforms worn by the Judges here resemble the uniform worn by the former Catholic Inquisition, and this is something I do not respect. The way you bow when you enter the courtroom reminds me of a satanic ritual. I have tried to find a para-psychological explanation for this. I'm afraid that should I bow to your ceremonial, my consciousness might be affected by forces I cannot control.'[37])

The Trial Chamber then discussed the *Croissant* v. *Germany* case which the Trial Chamber had invoked in its 4 April 2003 ruling as a reason for not imposing counsel. Having earlier said it was irrelevant to the Milošević case, as it undoubtedly was – the German defendant did not want to defend himself; he did not suffer from ill health, and the imposition was of an additional lawyer, not the removal of the ones he had chosen – the Chamber changed tack and decided that it did represent a precedent after all. One of the reasons given by the European Court of Human Rights, which upheld the decision to impose counsel, was that the trial was very complex, yet complexity had never been mentioned as a factor in deciding to impose counsel on Milošević. If it had, that would have been an argument against imposition. After the trial was over, Steven Kay, the assigned counsel, said, 'You have to structure the trial so that the man who knows the case best can argue that case. No lawyer in the world knew that case better than Milošević.'[38]

37. Trial transcript, 23 August 2005, p. 43052.
38. Steven Kay, 'ICTY court assigned defence counsel to Slobodan Milošević', speaking in Galway, 29 April 2006.

The ICTY then invoked the US Supreme Court *Faretta* case. It admitted that that ruling confirmed that it is a 'fundamental' constitutional right in the United States to defend oneself in person. But the Trial Chamber just repeated its legally dangerous mantra that this general rule admits of exceptions. But in any case the exceptions quoted include only 'serious and obstructionist misconduct' by the defendant. In other words, the exceptions listed in *Faretta* did not support the Trial Chamber's argument in the Milošević trial: they refuted it.

The ICTY then further claimed that even *Faretta* was hedged around by *Martinez* v. *Court of Appeal of California* in 2000. At this point, the ICTY seemed simply to be falsifying the evidence to support its case. It said that *Martinez* provided a precedent, when in fact that case concerned only appeals, not trials, and it misquoted the ruling, 'Even at the trial level, the government's interest in ensuring the integrity and efficiency of the trial at times outweighs the defendant's interest in acting as his own lawyer.' The deception lies in the fact that the Chamber omitted to quote the previous sentence of that ruling, which reads:

> We have further held that standby counsel may participate in the trial proceedings, even without the express consent of the defendant, as long as that participation does not 'seriously undermine' the 'appearance before the jury' that the defendant is representing himself … Additionally, the trial judge is under no duty to provide personal instruction on courtroom procedure or to perform any legal 'chores' for the defendant that counsel would normally carry out.

In other words, the sentence about how 'the government's interest in ensuring integrity and efficiency of the trial at times outweighs the defendant's interest in acting as his own lawyer' refers precisely to the government's and the defendant's *interests*. It means that a judge cannot be expected to spend valuable trial time coaching an untrained defendant if he elects to represent himself, and that the defendant may therefore be

harming his own case and interests. The sentence does not say that the government's *duty* to ensure the integrity and efficiency of the trial can outweigh the defendant's *right* to act as his own lawyer.

The same applies to the ICTY's allusion to cases in English and Scottish law where counsel can be imposed in order to protect witnesses in rape cases from the trauma of being cross-examined by their alleged attacker. To bring this into the equation was disgraceful, since the ICTY is notorious for the lavish measures it offers witnesses for their protection, such as anonymity and video links, measures which themselves were drawn from these precedents in criminal trials. In any case, the issue of trauma to the witnesses was nowhere mentioned as a reason for imposing counsel on Milošević.

The ICTY then made the extraordinary claim that the jurisprudence of several civil law countries (France, Germany, Belgium, the Federal Republic of Yugoslavia) requires the presence of a Defence lawyer in serious criminal trials. The fact that it introduced this apparently decisive argument right at the end of very lengthy legal reasoning gives rise to suspicion – a suspicion aggravated by the ICTY's vague statement that the justification for these rules 'appears to be' that the state requires defendants to have adequate defence. Why 'appears to be'? Did the authors of this tawdry text not know what the reasons were when they wrote it? Did they not recall the distinction made by Judge May between the inquisitorial and adversarial traditions? How could the imposed counsel present a case if the defendant refuses to instruct him? In any case, the judges seemed ignorant of their subject: Article 13 of the Criminal Procedure of the Federal Republic of Yugoslavia provides that defendants may elect to defend themselves in person, a fact the judges omitted to mention.

Even in inquisitorial systems, moreover, the trial cannot proceed without the presence of the defendant since the judge would not be able to question the defendant. Yet trial *in*

absentia is exactly what ICTY imposed on Milošević. On 19 April 2005, when Kosta Bulatović was in court on a day when Milošević was ill and therefore not in court, Judge Robinson declared airily, 'We are here without the accused. We have been informed that the accused is ill. We have an obligation to carry on.' When it came to his turn to speak, Bulatović said very politely that he would not testify in Milošević's absence. The judges reacted angrily, calling his decision 'irrational', and the next day Bulatović was charged with contempt of court. He was convicted and given a suspended prison sentence, even though he was nearly 70 years of age and in poor health.

The fact that the ICTY now permitted trial *in absentia* conflicts not only with its own Statute, which also states that defendants have the right to be tried in their presence (Article 21.4(d), but also with the statement made by the Spanish ambassador to the United Nations. Speaking in the Security Council on the day the ICTY was brought into being, he said, 'We should especially emphasise that the Statute rules out trial of the accused *in absentia* … .'[39] As we saw in Chapter 4, other statements made on that same occasion by other ambassadors, on the new Tribunal's jurisdiction, were, by contrast, quickly declared to have legal force and incorporated into the ICTY's own jurisprudence. The ICTY was cherry-picking as usual.

The decision to impose counsel caused an outrage among the witnesses whom Milošević had called in his Defence. Out of the 97 witnesses on Milošević's list, 92 refused to testify. The Trial Chamber considered issuing subpoenas on 18 October 2004 but decided against it and the trial effectively ground to a halt. Detailed protests were issued by lawyers from around the world[40] and by Nikolai Ryzhkov, the former prime minister

39. UN Security Council, Provisional Verbatim Report of the 3,207th Meeting, 25 May 1993, UN Doc. S/PV.3217, p. 40.
40. One of these, issued on 29 July 2004, was signed by over a hundred lawyers from around the world. It can be viewed on <www.icdsm.org> and it was widely quoted by Milošević during the hearing on 21 October 2004, p. 40ff. Another statement was issued on 9 September 2004 by

of the Soviet Union who had agreed to appear as a Defence witness but who announced from Moscow that he would not come until the imposition of counsel was rescinded.

The assigned counsel appealed against their own imposition and a hearing was held on 21 October 2004. Both the assigned counsel, Steven Kay, and Milošević spoke. Kay outlined the legal and ethical reasons why it was wrong to impose counsel, making the point that core rights or 'minimum guarantees' had to be respected precisely when it was most inconvenient to do so. Milošević complained that promises to allow him enough time to prepare his case and interview witnesses beforehand had not been respected. He claimed that bouts of flu had been added to the general number of days when he had been unable to come to court, something from which no one is immune.

However, Milošević's argument was not only that there was a core right to self-defence in the ICTY's own charter. His assertion of his right to self-defence went to the heart of his own Defence strategy. Milošević insisted that the charges against him were political – that he was on trial for defending a certain policy – and that this was the reason why he refused to have a defence lawyer. To have accepted a lawyer would have implied an acceptance that the charges were legal and criminal, rather than political. He said:

> This is a political trial. What is at issue here is not at all whether I committed a crime. What is at issue is that certain intentions are ascribed to me from which consequences are later derived that are beyond the expertise of any conceivable lawyer. The point here is that the truth about the events in the former Yugoslavia has to be

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a smaller team of French witnesses and lawyers (i.e. people from a civil law tradition), Patrick Barriot, Yves Bonnet, Eve Crépin, Pierre-Marie Gallois, Gabriel Kaspereit, Branko Rakić (one of Milošević's legal advisers) and Jacques Vergès. A third was issued on 25 November 2005 by a group of 13 Russian lawyers comprising the 'Group of members of the Russian Association of International Law for Monitoring the Process Prosecutor v. S. Milošević in the International Criminal Tribunal for the former Yugoslavia'.

> told here. It is that which is at issue, not the procedural questions, because I'm not sitting here because I was accused of a specific crime. I'm sitting here because I am accused of conducting a policy against the interests of this or another party. The nature of the proceedings here is such that a lawyer cannot deal with it.[41]

The ICTY had to find a way out of the mess it had created. Although it had ruled that 'Should the Accused fail to cooperate with counsel, the trial will nonetheless proceed',[42] no witnesses were coming to The Hague and the trial was therefore not advancing. A measure which had been adopted ostensibly to prevent delays had in fact caused months of extra delay. The Appeals Chamber convened on 1 November 2004. It found that the Trial Chamber had gone too far in the tasks it had given the assigned counsel, but that the basic decision to impose counsel was sound. For the most part, it followed the Trial Chamber's highly erroneous argument about how the right to self-representation was 'not absolute', and also used the Trial Chamber's dishonest arguments about disruption, eliding into one single category deliberate disruption and unintentional disruption, and saying that 'it could not be' that the two should be treated separately. It did not quote any legal precedent in support of this view.[43]

On the other hand, the Appeals Chamber overruled the Trial Chamber on the measures which the Trial Chamber had adopted. It ruled instead that the proposed solution had to be proportional to the alleged problem. Having posed the rhetorical question of what should be done when a defendant can appear in court only one day a week,[44] the Appeals Chamber

41. Appeals Chamber, transcript, 21 October 2004, p. 53.
42. Trial Chamber Decision, 22 September 2004, paragraph 70.
43. See on this (and much else) the excellent article by Tiphaine Dickson and Aleksandar Jokic, 'Hear No Evil, See No Evil, Speak No Evil: The Unsightly Milošević Process', *International Journal of Semiotics of Law*, Kluwer Academic Publishers – Springer Netherlands, July 2006.
44. Appeals Chamber Decision on Interlocutory Appeal of the Trial Chamber's Decision on the Assignment of Counsel, 1 November 2004, paragraph 14.

did not say that a trial would have to be abandoned in such circumstances, thereby supporting *nem con* the decision by the Trial Chamber that a sick defendant may be tried *in absentia*. The Appeals Chamber merely changed the modalities and said that, on most days, Milošević should be allowed to defend himself as before, while imposed counsel should be used only if his health deteriorated again. This duly happened in April 2005 when Kosta Bulatović testified.

The corrupt legal culture of the ICTY is reflected, moreover, in the fact that the Appeals Chamber categorised the Trial Chamber decision to impose counsel as rightfully 'discretionary'. It said in paragraph 9 of its 1 November 2004 ruling that the decision to impose counsel 'fits squarely' in the same category as other 'discretionary' decisions such as 'imposing sentence', 'determining whether provisional release should be granted', decisions 'in relation to the admissibility of some types of evidence', 'evaluating evidence', and 'deciding points of practice or procedure'. But decisions about the admissibility of evidence and sentencing are hardly 'discretionary' at all, in the sense that they must be guided by the rules and the law. It is incredible to describe as rightly 'discretionary' a decision which overruled what the ICTY's own Statute calls 'a minimum guarantee': if a Tribunal has the right to use its discretion to overrule its own rules, then it truly is a law unto itself and the rule of law has come to an end.[45]

45. See Dickson and Jokic, 'Hear No Evil', paragraph 3.2.

10
Death in The Hague

AT 9 a.m. on the morning of Saturday, 11 March 2006, two guards started to unlock the cells in E1 wing of the United Nations Detention Unit at Scheveningen, the prison where ICTY indictees are held during their trials. One of them opened Slobodan Milošević's cell and called, 'Good morning, Mr. Milošević,' before moving on to the next cell. The wake-up call on Saturday morning was later than during the week; there were no court hearings and detainees usually went out into the yard for an hour's sport. Milošević, however, did not generally participate in the outdoor activities and so the guard left him lying on his bed, assuming that he was asleep. The door to his cell was locked again five minutes later, as the guards left the floor to supervise the sport session. It was not until one hour later that a guard returned and, seeing that Milošević was still lying on his bed, reopened the door. As he approached the bed, the guard saw that Milošević's face was greyish in colour and that his ears were blue. One arm was hanging over the side of the bed. The guard summoned a colleague and tried to rouse Milošević by calling his name and shaking his foot. He soon realised that the Hague Tribunal's most famous defendant was dead at the age of 64.

Even though the media had almost completely ignored the trial for its duration, Milošević's death evinced a sadly predictable orgy of denunciation of him. All the tired old stories about the former president's responsibility for various terrible crimes were brought out of the cupboard and given one last airing. None of the actual evidence presented at the

trial was discussed in the world's mainstream media, especially not since it conflicted with the usual view that the trial had comprehensively demonstrated Milošević's guilt.

By a curious coincidence, Milošević died on the day before the third anniversary of the assassination in Belgrade of Zoran Djindjić, the Serbian prime minister. In contravention of Yugoslav law, Djindjić had spirited Milošević out of prison in Belgrade and sent him to The Hague on Serbia's national day, St Vitus' Day, 28 June 2001, choosing as the day for the handover the anniversary of the Battle of Kosovo Field in 1389 as well as the anniversary of a famous speech Milošević had made at the beginning of his political career in 1989. Djindjić had later been gunned down in the streets of Belgrade on 12 March 2003, an event which led to mass arrests in Yugoslavia as huge numbers of people were implicated in the assassination and rounded up. The chief suspect, Milorad Luković, known as 'Legija', was the same man who had helped Djindjić win power by unseating Milošević in the putsch of 5 October 2000.

The Prosecutor, Carla del Ponte, issued a spiteful and sarcastic statement: 'I deeply regret the death of Slobodan Milošević. It deprives the victims of the justice they need and deserve.' As usual, she used the word 'justice' to mean 'a guilty verdict'.[1] The judges were more circumspect. Judge Robinson convened a session on 14 March to declare the trial ended: 'We express our regret at his passing. We also regret that his untimely death has deprived not only him but indeed all interested parties of a judgement upon the allegations in the indictment. His death terminates these proceedings.'[2]

Marko Milošević travelled to The Hague to collect his father's body and a funeral was organised quickly in Belgrade. No state officials or family members attended the funeral, while the family members did not even dare to travel to Serbia: Milošević's widow and children feared that the authorities

1. Press conference by the ICTY Prosecutor, 12 March 2006.
2. Trial transcript, 14 March 2006, p. 49191.

there would arrest them. Estimates of the number of ordinary Serbs who flooded into Plato square in front of the Yugoslav parliament to attend the funeral ceremonies varied between 50,000 and 500,000: there was a huge turnout. The crowd was addressed, among others, by Ramsey Clark, the former US attorney general who had taken up Milošević's cause, and by the Austrian playwright and novelist, Peter Handke, who had written on many occasions that the Serbs had been unfairly demonised. Handke's presence at the funeral so shocked the director of the *Comédie française* in Paris that he cancelled the production of a play by Handke in his theatre after reading about his funeral speech in the papers. The former Yugoslav president was buried under the tree in his home town of Požarevac where he had first kissed the woman with whom he was to spend his life, Mira Marković. A condolences announcement was placed in the Belgrade daily, *Politika*, by a group of indictees at the ICTY, including the recently arrested Croatian general, Ante Gotovina, who was facing charges for 'Operation Storm' in 1995, in which Croatia had retaken the territory of the self-proclaimed 'Serb Republic of Krajina', and which had resulted in the flight of hundreds of thousands of Serb inhabitants in the biggest single population transfer of the 1991–95 Balkan wars. Gotovina's support for Milošević and his 'struggle' at The Hague reflected the fact that the ICTY is hated almost as much in Croatia as in Serbia.

Emotions ran high throughout this time because, on the day Milošević died, Zdenko Tomanović, one of Milošević's three Serb legal assistants, released a handwritten letter from Slobodan Milošević to Sergei Lavrov, the Russian foreign minister, dated 8 March 2006. In this letter, Milošević had alleged that someone at The Hague was taking 'active, wilful steps to destroy my health', and that it was in order to cover this up that the ICTY judges had refused to let him leave The Hague to visit a heart clinic in Moscow: Milošević said that the manipulation of his health would inevitably be discovered by Russian doctors. He adduced as proof of his claim the fact that

a substance had been discovered in his blood on 12 January but that he had inexplicably not been told about its presence until 7 March. Milošević wrote, 'An extremely strong drug was found in my blood, which is used, as they themselves say, for the treatment of tuberculosis and leprosy.' He concluded, 'I am addressing you in the expectation that you will help me defend my health from the criminal activities in this institution.'

The drug in question was rifampicin, which would have had the effect of neutralising the other medicines he was taking to keep his blood pressure and heart condition under control. As was discussed in Chapter 9, Milošević's weak health had been a matter of common knowledge ever since the trial started, and it was known that he had severe heart problems. In the early years of the trial, his supporters had repeatedly alleged that the trial would kill him and that he should therefore be released on compassionate grounds. The decision to impose counsel on him had been taken in spite of the fact that, as the *amicus curiae* Steven Kay said to the judges, 'Sick men do not stand trial.' The judges had turned a deaf ear to this argument – and declared the relevant medical reports to be confidential.

This was not the first time that there had been complaints about Milošević being given the wrong medicine. On 23 November 2002, two Dutch journalists at the NRS Handelsblad reported that the wrong medicine had been administered, which had caused his blood pressure to rise very sharply.[3] The trial was suspended as a result but the Tribunal refused to discuss the matter, claiming that it was private. The *amici curiae* on this occasion called for the trial to be suspended for a year but the Prosecutor reacted furiously, saying that Milošević had all the medical care he needed in prison. This was patently untrue.

For months before his death, Milošević had been complaining of a ringing sound in his ears and of pain behind his eyes.

3. 'Milošević given wrong medicine', by Cees Banning and Petra de Koning, *NRC Handelsblad*, 23 November 2002.

In November 2005, doctors from the Bakulev heart clinic in Moscow had examined him and said that his condition could be cured but that he would have to go to Moscow for treatment. Milošević duly made a request to this effect on 12 December 2005. One of his stated reasons for wanting to go to Moscow was that he did not trust the Dutch doctors who were treating him in the UN Detention Unit. On 11 January the Trial Chamber demanded guarantees from the Russian government that Milošević would return, and these were duly given and formally submitted to the court on 18 January. However, in spite of receiving the guarantees it had demanded, the Trial Chamber ruled on 23 February 2006 that Milošević would not be allowed to go to Moscow after all. He died just over a fortnight later.

It was in this period between January and March 2006 that, Milošević alleged, rifampicin had been administered to worsen his health. Many close associates of the former president lent credence to the poisoning theory, and some medical experts also seemed to believe it.[4] In an interview on the Moscow-based Radio Ekho, given on 24 February (that is, before Milošević himself even knew about the rifampicin but after the judges had issued their refusal to let him go to Moscow), Milošević's brother Borislav had said, 'I do not know whether or not they will poison him but I do not rule this out altogether. I do not rule out that he might be even secretly liquidated.'

After his death, Milošević's close political ally, Momir Bulatović, who had been federal prime minister of Yugoslavia while Milošević had been president, also told a press conference that Milošević had been 'strongly and deeply convinced' that he was being poisoned by the ICTY.[5] Bulatović had been in

4. 'A cunning way to kill a man that needs no expertise', Dr Thomas Stuttaford, *The Times*, 14 March 2006.
5. 'Ex-Serbian leader "confided poisoning claims on eve of death"', *BBC Monitoring Europe (Political)*, 15 March 2006, text of report by Montenegrin Mina news agency.

The Hague when Milošević died, and he had been due to appear as a Defence witness: he said that he had been about to give testimony which would have 'clinched his defence with irrefutable evidence' that the 1990s Yugoslav wars were not the result of 'a criminal enterprise orchestrated by Milošević but a chain of irreversible events' that tore apart the former federation.[6]

The ICTY, meanwhile, made the equal and opposite allegation. The Prosecutor had alleged at various times throughout the trial that Milošević was manipulating his own health by refusing to follow his prescribed medical regime, and this theory was again leaked to the press after Milošević's death. The claim was that Milošević himself was taking the rifampicin in order to neutralise the effects of his other medicines so that his health would worsen and the case would be strengthened for allowing him to go to Moscow. Dr Donald Uges, appointed by the ICTY, said that Milošević was secretly taking the medicine to secure 'a one-way ticket to Moscow',[7] although it is impossible to see how a responsible toxicologist can say anything more than that he had found this or that substance in a person's blood.

However, one does not need to engage in conspiracy theories to see where the responsibility for Milošević's death really lies. The judges had known for years that he was ill and yet they refused to release him for medical treatment or even to interrupt the trial. Instead, they shamefully used his weak health as a reason for imposing Defence counsel. Academician Leo Bokheria, the Russian cardiologist who wanted to treat Milošević, put the matter very clearly: 'If Milošević had been taken to any specialised Russian hospital, the more so to such a stationary medical institution as ours … he would have lived for many long years to come … Unfortunately, it is an absolutely

6. 'Friend declares Milošević swore he'd never self-medicate or poison himself, ' <www.pravda.ru> 15 March 2006.
7. 'Milošević "took wrong drugs"', *BBC News*, 13 March 2006 <www.bbc.co.uk>.

banal fact that he died due to lack of medical treatment. That's all.'[8] It is no doubt for this reason that Milošević's widow, Mira Marković, referred to 'the criminals who murdered you in The Hague' in a poignant letter read out at the funeral in Belgrade which she could not herself attend. In other words, the responsibility for Milošević's death in custody, and for the fact that this mammoth and unique trial ended inconclusively, lies squarely with the judges of the ICTY. Having abused numerous fundamental judicial principles during the trial, they abused the most elementary humanitarian considerations too as the defendant's life drew to its premature end.

8. 'Milošević could be saved if he was treated in Russia–Bokeria', *Itar-Tass*, 15 March 2006.

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